IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 202
ARC 108/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GARRY WAYNE CRUICKSHANK Plaintiff
AND	THE CHIEF EXECUTIVE OF UNITEC INSITUTE OF TECHNOLOGY Defendant

Hearing:	3-4 and 6-7 May, 6-7 July 2010, 27 February 2012 And by written submissions filed on 30 August, 13 and 17 September 2010, 11 and 25 November 2011 and 17 February 2012 (Heard at Auckland)
Counsel:	Lorne Campbell, counsel for plaintiff Sherridan Cook, Stephanie van der Wel and Alexandra Stuart, counsel for defendant
Judgment:	30 November 2012

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The plaintiff's suspension from his employment was an unjustified disadvantage to that employment for which he is awarded compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $8,000.

B The plaintiff's "marginalisation" allegations do not constitute the personal grievance of unjustified disadvantage in employment.

C The plaintiff was dismissed unjustifiably by the defendant for which he is entitled to the interim partial remedy of compensation for lost remuneration in the sum of $25,000.

D Additional and other remedies (including reinstatement) are to be reconsidered by the Court in light of further evidence at a hearing to be scheduled.

INDEX

Introduction	[1]
Background	[6]
Relevant facts	[18]
The terms and conditions of the plaintiff's employment	[78]
Personal grievance tests	[90]
The plaintiff's personal grievances	[91]
The suspension personal grievance	[97]
Decision – suspension personal grievance	[101]
Unjustified disadvantage grievance – "marginalisation"	[113]
Decision – marginalisation personal grievance	[119]
Dismissal – the case for the plaintiff	[126]
The case for the defendant	[171]
Decision – dismissal	[217]
Remedies	[249]

Introduction

[1] Garry Cruickshank challenges by hearing de novo the justification for his suspension from his employment and subsequent dismissal as head of the Plumbing and Gasfitting Department in the Faculty of Technology and Built Environment at the Unitec Institute of Technology (Unitec). In a determination issued on 9 December 2009[1] the Employment Relations Authority concluded that Mr Cruickshank had been dismissed justifiably. The Authority did, however, decide that his suspension from work before his dismissal was an unjustified disadvantage in his employment for which it awarded what it described as a "modest level of compensation to remedy the defective process which led to the suspension"[2] of $1,000. With this exception, the Authority did not accept Mr Cruickshank's claims to other unjustified disadvantages in his employment.

[2] Mr Cruickshank asks the Court to increase the compensation for his unjustified suspension, to find that he was unjustifiably disadvantaged by being marginalised, and to conclude that his dismissal was unjustified. This last grievance should be remedied by reinstating him to his former position, reimbursing him for lost remuneration, and requiring the defendant to compensate him for non-economic

[1] AA 439/09.
[2] At [53].

losses suffered as a result of his dismissal. Mr Cruickshank also seeks an order for costs.

[3] After the conclusion of the hearing and while judgment was reserved, the Auditor-General issued her Report on the Inquiry into the Plumbers, Gasfitters and Drainlayers Board. Mr Cruickshank asked for an opportunity to both tender the Auditor-General's report as evidence in the proceeding and to make submissions on it despite acknowledging that this would delay the finality of this judgment. That application was allowed, the report has been submitted in evidence, and the parties have made further submissions to the Court on its relevance and effect in the case.

[4] For reasons set out in the Court's interlocutory judgment delivered on 27 February 2012,[3] this judgment does not address Mr Cruickshank's claim to reinstatement. Circumstances have changed significantly since the original hearing affecting, in particular, that principal remedy claimed by Mr Cruickshank. Dismissal having been found to be unjustified, the decision about the remedy of reinstatement will need to be made in light of these new factors.

[5] One of the reasons for the delay in issuing this judgment, which I regret, has been the need to separate from the personal grievance issues for decision, the considerable and controversial evidence about what was, is, and should be the way in which plumbing, drainlaying and gasfitting apprentices are trained and qualified. This is a subject on which Mr Cruickshank has firm views that he is not loathe to debate. I accept that they are held as part of a genuine wish to maintain higher quality standards and, therefore, to ensure that apprentices are trained and qualified to the highest standards of quality and safety. Although it is, in some respects (at least for Mr Cruickshank), difficult to separate his views and the conflicting responses to them from his suspension and dismissal, the rights or wrongs of different apprenticeship programmes are not the concern of this Court which is, in any event, not qualified to determine such controversies. Despite much of this considerable volume of evidence not being relevant strictly to the question of justification for Mr Cruickshank's ultimate treatment and dismissal by his employer, it and especially its implications both provide context for the dismissal and are

---

[3] [2012] NZEmpC 33.

relevant to the question of his reinstatement in employment which he seeks. Therefore, this evidence was not excluded at the trial and has had to be considered in my reading and re-reading of the very lengthy transcript of the evidence given and of numerous documents about these questions, some of which were admitted after the completion of the hearing.

Background

[6] The training and qualification in issues of safe practice of plumbers, gasfitters and drainlayers are of utmost importance. A number of people involved in, or affected by, these activities die or are seriously injured from foul water backflows, exploding water cylinders, and explosions and fires caused by faulty gas installations. Plumbers and gasfitters must be well trained and pass a stringent testing qualification before being registered in these fields.

[7] Unitec is a tertiary institute under the Education Act 1989 required to develop and deliver programmes leading to qualifications in vocational and trade fields. Although the New Zealand Qualifications Authority (NZQA) is responsible for registering qualifications at both universities and polytechnics, it is not responsible for approving polytechnic courses. This function is delegated to a body known colloquially as ITPQ (Institutes of Technology and Polytechnics Quality). Industry Training Organisations (ITOs) are responsible for designing and developing qualifications for approval by the NZQA. ITOs themselves cannot provide or deliver the courses that they design and develop because they are required to moderate the delivery of those approved programmes. Unitec's plumbing and gasfitting programme was approved by ITPQ and led to a qualification developed by the Plumbing Gasfitting Drainlaying & Roofing Industry Training Organisation (PGDRITO, what I will call simply the ITO) and approved by the NZQA.

[8] Course costs to students at Unitec were supplemented by funding received by it from the Tertiary Education Commission (TEC), approximately $7,000 per annum for each equivalent full-time student (EFTS). Enrolment in a Unitec course entitled

students to interest-free student loans from a body known as Studylink[4] on the basis that the qualifications to which the course led were approved. Students on ITO or other non-approved training/qualification courses were not entitled to such loans.

[9] In early 2008 the ITO announced that it had developed assessment materials and would begin to deliver new certificates in plumbing, gasfitting and drainlaying. Mr Cruickshank analysed the programmes and materials developed by the ITO. He considered that these were substandard and undeliverable. He also considered that it was not lawful for the ITO to deliver training programmes. Unitec also took this view at that time.

[10] Unitec developed and ran its own programme, in effect in competition for students with the ITO. Its programme was ITPQ approved and funding for it was provided by the TEC.

[11] The Apprenticeship Training Trust (ATT) is a charitable trust employing plumbing and gasfitting apprentices. It seconds these apprentices to what are known as "host employers" for a fee. It was developed in an attempt to overcome the problem of insufficient plumbers, gasfitters and drainlayers taking on full time apprentices in their businesses. The ITO training programme was initially attractive to the ATT because it consisted of only 11 weeks of block courses as opposed to Unitec's 22 weeks which involved more wages and lost time for the Trust and its associated employers. Unitec nevertheless retained the goodwill and patronage of the ATT based, in substantial part, on the quality of its courses.

[12] After a career as a plumber and gasfitter, Mr Cruickshank was first employed at Unitec as a tutor in February 1997. Having held various management and supervisory roles since 1999, he was appointed as Head of Discipline (Building Services) in 2004. In 2009 he was appointed as Head of Department (Plumbing and Gasfitting) as part of Unitec's Faculty of Technology and Built Environment. Mr Cruickshank was engaged on an individual employment agreement as a full time lecturer.

---

[4] A refreshingly acronym-free identity.

[13] Mr Cruickshank regards himself as the foremost expert on gasfitting in New Zealand in both technical and legislative senses. He is or was on various Standards New Zealand committees to do with gas standards and was involved with the Plumbers, Gasfitters and Drainlayers Registration Board between 2002 and 2006. There he assisted with resolving issues about examinations, created a gas audit system and was involved with professional development. He has also assisted the Energy Safety Service in its operations and with its processes, particularly to do with carbon monoxide poisoning. In these regards, Mr Cruickshank kept the Chief Executive Officer of Unitec informed about issues relevant to it which arose from time to time. He has also appeared as an expert witness in court cases. He was an appropriately qualified and committed advocate of Unitec's stance on issues of training quality, at least until about mid-2009.

[14] Mr Cruickshank's dismissal was the result of letters on Unitec letterhead that he sent to students and their employers, allegedly against Unitec's advice or instruction. The letters warned apprentices, their employers and potential employers of the pitfalls of training programmes and qualifications offered by other providers although his employer had then very recently wished to cease to be in conflict, and have a closer association, with those providers.

[15] The background to the case includes a long and at times bitter history of industry training conflict, much of this between Unitec and the ITO. Unitec and its predecessors have long been involved in the training of plumbers, gasfitters and drainlayers, all trades in which elements of safe working practices and safe standards of work are paramount. Against that background, the more recently established ITO which is not a 'training provider' such as Unitec, has sought to change traditional practices of the training of plumbers, gasfitters and drainlayers. As one of a number of ITOs established under the Industry Training Act 1992, the ITO is responsible for setting standards, arranging for training programmes and monitoring their quality. To preserve the independence of its role, however, the ITO does not itself offer training. This new regime has permitted others, including private sector organisations, to compete in the field that was once dominated (at least in the northern regions of New Zealand) by Unitec.

[16] Another relevant background issue is the change in recent years to the types of training courses available for plumbing, gasfitting and drainlaying. Previously, especially at Unitec, apprentices undertook long technical courses interspersed with periods of practical work for their employers. More recently, the ITO has favoured and developed a series of short courses to be offered by both public and private training providers in different parts of the country. These courses were perceived by some (including Mr Cruickshank) as being not only less costly than Unitec's longer course, but, more importantly, also of a lower standard.

[17] So the significant background to this case includes a longstanding conservatism and resistance to change that was perceived to be lowering standards, by both Unitec institutionally and a large number of its staff including Mr Cruickshank. As sometimes happens in the historical affairs of nations, the case concerns an apparently sudden about-face by Unitec in which former enemies are now portrayed as allies with the necessity to persuade loyal and supportive staff to adopt a similarly rapid and apparently radical revision of views and attitudes. Yesterday's enemy suddenly becomes today's ally, or at least potential ally, to be treated accordingly.

Relevant facts

[18] Until about mid-2009, it is probably no exaggeration to say that Unitec and the ITO were at loggerheads about the issues just described. Mr Cruickshank was at the forefront of Unitec's drive to preserve what he and it considered were the necessary high standards of training and qualification to which Unitec adhered. Many in the industry and in the trade training sector, especially associated with Unitec, supported that position spearheaded by Mr Cruickshank.

[19] By mid-2009 the atmosphere at the head of Unitec's management structure was, however, changing with those responsible for its direction and operation opting for a consultative and conciliatory approach to the ITO and an acceptance of its training course requirements.

[20] It seems generally accepted that other than concerning the events that led to his dismissal, Mr Cruickshank had a good record as a lecturer and administrator at Unitec. He consistently received commendations, awards and performance bonuses for many of the years of his employment. At the end of 2008, for example, Mr Cruickshank received a monetary bonus in recognition of outstanding performance and contribution to Unitec in that year.

[21] In respect of some of his external relationships, however, Mr Cruickshank did not enjoy the same degree of success. In his dealings with a number of bodies to do with the education and training of apprentices and which he perceived to be at odds with his views and those of Unitec, Mr Cruickshank was regarded as uncompromising, confrontational and uncooperative. This led, on several occasions, to complaints about his conduct and although he was never sanctioned officially by Unitec in respect of these, by mid-2009 it had started to put in place some strategies in an attempt to improve those necessary aspects of his role as Head of Department. Although Unitec's case emphasised these, my impression is that they were promoted both discreetly and informally by Unitec and had only just begun to be implemented when the events with which this case is concerned occurred.

[22] Absent the events of early to mid-July 2009 that resulted in Mr Cruickshank's suspension and then dismissal, Unitec's concerns about his external inter-personal relationships would not have otherwise been remarkable or have justified any serious sanction against him. The significance of this aspect of his performance of his role is relevant now in the assessment of Unitec's conclusion that it could not trust Mr Cruickshank to change his ways and, not unconnected with this, to its opposition to his reinstatement in employment.

[23] As Head of Department, Mr Cruickshank reported to the Faculty Executive Dean. He was responsible for the development and delivery of all programmes, courses, and activities of the Department, having responsibility for a staff of 25 and a budgeted income of almost $4.5 million including an expenditure budget of more than $2.3 million.

[24] In early 2009 Mr Cruickshank prepared a paper for Unitec's Faculty Academic Committee about the costs of funding Unitec's apprenticeship programme compared to the ITO's courses. He spoke to the paper at a meeting of the Committee on 21 April 2009 and it was subsequently agreed with two of Unitec's senior Deans that he would approach the Manukau Institute of Technology (MIT) about a possible joint approach to NZQA and ITPQ to challenge the status of the ITO's programme delivery.

[25] A meeting with MIT representatives took place on 26 May 2009 and one of Mr Cruickshank's colleagues from MIT, Pravha Govindasamy, prepared a draft letter to NZQA/ITPQ. Mr Cruickshank and others commented on the draft and he was thereafter under the impression that the letter would be sent and that a reply could be expected. Unknown to Mr Cruickshank at that time, on 7 July 2009 his supervisor (one of the two Acting Executive Co-Deans, Laurie Richardson) decided not to send the letter but did not tell Mr Cruickshank of this decision until 16 July 2009, although MIT was informed of this decision shortly after it was made. I will refer subsequently to this letter as the MIT/Unitec letter.

[26] About 25 per cent of apprentices enrolled at Unitec are employed by the ATT. In early July 2009 Mr Cruickshank told Mr Richardson that he suspected that the ATT had done a deal with ITO about their future relationship. Mr Cruickshank made further inquiries in an attempt to firm up his suspicions that were then based on rumour and he sent Mr Richardson an email at 4.20 pm on 2 July 2009. This expressed Mr Cruickshank's concern that ATT had indeed agreed to align itself with the ITO and that this might cut out Unitec. He said that this, in turn, would affect another project then being worked on between Unitec and the ATT, promotion and use of electronic book delivery material for the Unitec programmes. The ATT then owed Unitec a significant amount for the cost of developing this project.

[27] Although unknown at the time to Mr Cruickshank, Mr Richardson emailed the Chief Executive of Unitec, Rick Ede, on 3 July 2009 about these matters.

[28] The exercise in rapprochement between the ITO and Unitec really began on 30 June 2009 when John Berridge, General Manager of ATT, emailed Dr Ede,

advising him that Mr Berridge and the CEO of the ITO, Ian Elliott, wished to meet confidentially with Dr Ede and Mr Richardson. The purpose of the requested meeting was to both advise Unitec of the ATT's new initiatives and directions and to discuss the involvement of Unitec in an industry training development that the ITO and ATT proposed. Mr Cruickshank was, deliberately, not invited to that meeting because of his previously fractious relationship with the ITO. Mr Elliott, who was behind the proposal put forward by Mr Berridge, was hopeful that he (Mr Elliott) and Dr Ede, who had both been appointed relatively recently to their positions, might be able to make progress without the "baggage" that had dogged the relationship of these bodies previously and of which Mr Cruickshank was a leading porter.

[29] Although excluded from participation, Mr Cruickshank was, however, made aware of the proposed meeting and its purpose and his advice was sought by Mr Richardson about the ATT's request and its implications for Unitec. Mr Cruickshank contributed constructively to Mr Richardson's request for information which was passed on to Dr Ede and used by him during and following the meeting that took place on the early afternoon of 7 July 2009 at Unitec.

[30] At the meeting, Mr Berridge of ATT announced that it had entered into a strategic partnership with the ITO so that in future all its plumbing and gasfitting apprentices would be trained exclusively through the ITO system rather than in Unitec's own programme. The ATT was entitled to do so. In these circumstances and because of Unitec's perception that this proposal posed a serious threat to the viability of the plumbing and gasfitting department, Mr Elliott of the ITO invited Unitec to work with it to deliver block courses for the ITO including, in particular, block courses for ATT students.

[31] Unitec, albeit cautiously and carefully, agreed to work with the ITO and, to that end, committed to attempt to improve Unitec's professional relationship with it. A part of that process was an agreement with Messrs Berridge and Elliott to present a seminar directly to relevant Unitec staff which was consequently arranged for 13 July 2009.

[32] Mr Richardson had been aware of Mr Cruickshank's role (together with Ms Govindasamy of MIT) in drafting a letter to the ITPQ and NZQA challenging the lawfulness of the ITO's programme. As already noted, in view of the developments just described, Mr Richardson asked Ms Govindasamy to suspend the proposal to send this letter. Mr Richardson did not likewise immediately advise Mr Cruickshank of this development although he knew of the plaintiff's intense involvement in it.

[33] Mr Richardson telephoned Mr Cruickshank after the meeting of 7 July 2009 advising him and confirming that the ATT and the ITO had reached agreement for all future apprentices to be enrolled with the ITO. Mr Richardson asked Mr Cruickshank what effect he thought this would have. Mr Cruickshank said that he thought Unitec might be able to retain between 30 and 40 per cent of apprentices.

[34] Mr Cruickshank asserts that Mr Richardson did not tell him then that Unitec intended to offer the ITO's block courses. However, the plaintiff says that he was told that there was a possibility that Unitec might run some ITO courses. Mr Cruickshank expressed his surprise because the two men had previously discussed the possibility of running the ITO programme and had agreed that this was not possible.

[35] Later that day Mr Cruickshank rang Mr Richardson again to ask if he (the plaintiff) was "being set up". Mr Cruickshank was concerned that Unitec had already committed itself to delivering the ITO courses at the expense of its own programme and that any period of consultation about this idea was a charade. Mr Richardson told Mr Cruickshank he was not being set up and that he (Mr Cruickshank) retained the full support of Unitec.

[36] Messrs Richardson and Cruickshank met at the former's request on 8 July 2009. Mr Richardson confirmed his advice that Unitec was exploring ways to work with the ITO and develop their block courses and confirmed again that Mr Cruickshank was not being "set up" by this process. Mr Cruickshank remained resistant to Unitec engaging with the ITO even if it only delivered a programme of study for it in a short course format, a similar arrangement to that which Unitec had with several other ITOs.

[37] Important to the decision of this case is the discussion between Messrs Richardson and Cruickshank on 8 July 2009 about the latter's intention to send out the letters that subsequently resulted in his dismissal. What the Court must decide is not what was said during this conversation but what Unitec concluded was said and whether this conclusion was one which a fair and reasonable employer would have reached in all the circumstances at the time. That is because the Court's role is to determine justification for the employer's actions.

[38] Mr Cruickshank again raised his concerns about the legality of the ITO programme and it was agreed that the ITO should provide Unitec with all its delivery and assessment material before there was another meeting with it about Unitec running ITO courses for ATT apprentices. Although Unitec had sought this material from the ITO for more than a year without response, it was thought reasonable that the material should be disclosed if Unitec was to reconsider running its courses. Mr Richardson's expressed view was that this would be possible in the same way that Unitec delivered ITO carpentry and automotive courses. Mr Cruickshank's expressed view was that this was a false analogy because those were night classes for specific units and selected trainees, rather than a programme for those ITOs as seemed to be intended for the Plumbing and Gasfitting ITO.

[39] It was agreed between Messrs Cruickshank Richardson that while Unitec would continue to run its own programme, any decision on offering ITO courses would be made at faculty level after advice from Unitec's Plumbing and Gasfitting Programme Committee.

[40] Mr Cruickshank's view was that although there would be significant adverse effects on Unitec if up to about 150 ATT apprentices left its programmes, it was unlikely that they would do so if given an informed choice about their options. That was because, in Mr Cruickshank's view, host employers of ATT apprentices had been disadvantaged in the late 1990s when problems at the ITO had prevented block courses operating for up to three years and industry training was delayed and disadvantaged. Mr Cruickshank believed that in these circumstances many apprentices had transferred to the Unitec programme to avoid the ITO equivalent. He was confident that once employers and apprentices appreciated what he

considered were the significant disadvantages of the ITO system, most or even all who might have left Unitec for the ITO would return to Unitec.

[41] Mr Cruickshank's view was that this could be achieved with relatively little effort. He was, however, concerned that Unitec could not run parallel concurrent ITO and Unitec courses although it did have sufficient staff to teach all students on the same programme.

[42] Mr Cruickshank decided to attempt to ascertain how many ATT students would stay with Unitec to enable a decision to be made about additional alternative courses to make up for some of the shortfall in student numbers. One of his major concerns was that Unitec should not have to reduce staff numbers because of a short-term shortfall in students.

[43] Against this background, Mr Cruickshank says he told Mr Richardson that he proposed sending letters to employers and apprentices to let them know that Unitec would continue to offer its programmes. The plaintiff says Mr Richardson advised Mr Cruickshank that he should not write to host employers because the ATT students were not employed by them. Mr Cruickshank claims that he was not directed by Mr Richardson not to write such letters but, rather, advised that he should not send them to host employers. He says that when he inquired of Mr Richardson whether it would be a problem writing to the direct employers of apprentices, Mr Richardson agreed that there would not be.

[44] Mr Cruickshank does not recall any comment from Mr Richardson about proposed letters to students. He says Mr Richardson did not caution him against sending letters to students, let alone prohibit this. Mr Cruickshank says Mr Richardson knew that he intended sending letters to employers and students, did not ask to see the letters, and did not forbid Mr Cruickshank from sending them.

[45] Both participants in the meeting agree that Mr Cruickshank asked whether he could send letters to both the ATT employers and students to persuade some of them to continue to use the Unitec programme in an attempt, thereby, to not lose up to one-third of the Auckland market for apprentices. Mr Richardson says that he told

Mr Cruickshank that the letters could not be sent to host employers because they were ATT clients rather than Unitec contacts and claims Mr Cruickshank agreed with this. Mr Richardson says that in subsequent discussion about sending letters to students who were enrolled as Unitec students, he agreed that Mr Cruickshank could engage in a conversation with them about his concerns while they were on block courses but says that he "cautioned against" sending letters to the apprentices.

[46] Mr Cruickshank's evidence was that Mr Richardson's response to his proposal to send letters to ATT employers was that this was "not a good idea". Mr Richardson says, by contrast, that he was emphatic in his refusal to allow Mr Cruickshank to send such letters. Mr Richardson denies that Mr Cruickshank raised the possibility of writing to "direct employers of apprentices", that is employers who were not ATT employers, because he says this would have been irrelevant.

[47] Mr Richardson says that a memorandum dated 20 July 2009 about these discussions (written for the purpose of Unitec's investigation into allegations of misconduct against Mr Cruickshank) confirms their exchanges on these critical questions. Mr Cruickshank relies upon the response he prepared a few days later in reply to Unitec's investigation of allegations of misconduct against him. By then, however, Unitec was investigating alleged serious misconduct by Mr Cruickshank so that both these accounts of events were prepared in that knowledge.

[48] Mr Richardson denies that he knew that Mr Cruickshank intended to send letters to employers and students and says that if he had known that at the time, he would have put a stop to it because doing so was inconsistent with Unitec's commitments to the ITO. Mr Richardson denies that Mr Cruickshank ever told him when he had finished the letters that they would be sent the next day as the plaintiff claims. The plaintiff claims that he did so and that this conversation was witnessed by an ATT employee.

[49] It is, however, common ground between Messrs Cruickshank and Richardson that at the 8 July 2009 meeting, Mr Cruickshank raised the possibility of establishing a Unitec training trust to compete directly with the ATT. Mr Richardson suggested that an existing Unitec training trust might be used for that purpose and agreed to

approach the head of the Carpentry Department to see whether its trust could accommodate more students. Mr Richardson says, however, that he cautioned Mr Cruickshank that Unitec would not proceed in this direction until it was engaged in meaningful discussions with the ITO to deliver the block courses. He denies giving Mr Cruickshank the impression that he (Mr Richardson) agreed with his proposal to attract students away from the ATT.

[50] Mr Richardson denies Mr Cruickshank's assertions about other discussions at the meeting on 8 July 2009. These included whether there might be surplus staff and, therefore, redundancies and whether Unitec had sufficient staff in the workshops to run two parallel programmes.

[51] Messrs Cruickshank and Richardson agree, however, that they organised a suitable meeting date of 13 July 2009 for the ATT and the ITO to meet with Unitec plumbing staff. Mr Cruickshank indicated to Mr Richardson that the meeting had the potential to be confrontational as many plumbing staff were highly sceptical of the ITO and would probably be so also of the ATT.

[52] Given the stark conflicts of vital evidence about what happened on 8 July 2009 and to determine the reasonableness of Unitec's conclusions about this, I have looked as well at the most contemporaneous records created by the participants in relation to that meeting. As already noted, in the case of Mr Richardson, that was a memorandum that he wrote on 20 July 2009. In Mr Cruickshank's case, that was a written account of events prepared at about the same time but presented by him to an investigation meeting on 23 July 2009. For reasons already set out, however, these accounts must be examined with caution because of their potential to be self-serving. I have also taken into account the evidence of the men's telephone conversation given by an ATT employee.

[53] When Mr Cruickshank returned to his office after his meeting with Mr Richardson on 8 July 2009, he collated lists of host and direct employers and ascertained that all host employers also had apprentices employed directly by them, either currently or in the past. He concluded, therefore, that most host employers were, or at least had been, direct employers. In these circumstances, Mr

Cruickshank composed a letter to be addressed to all direct employers of current and potential future apprentices which included many host employers, although not in that capacity. In what he envisaged was to be the first step in a Unitec campaign to promote its programme, Mr Cruickshank prepared these letters for sending.

[54] Because he knew that there were planned meetings between the ATT, the ITO, host employers, and apprentices beginning on the following Monday 13 July 2009, Mr Cruickshank considered it was imperative to inform the employers and apprentices of his views before those meetings. He considered that Mr Richardson was aware of this imperative. There were, according to Mr Cruickshank, other course planning requirements necessitating urgent decisions and therefore advice to the recipients of the letters. Within the next couple of days, the ATT announced it was going to enrol all its apprentices through the ITO and use the ITO's programmes.

[55] Two forms of letter were sent out by Mr Cruickshank on 9 and 10 July 2009. One was directed to apprenticeship students enrolled at Unitec and the other to employers or potential employers of apprentices. Because the content and implications of these letters to actual or potential employers of apprentices and students are a part of the decision to dismiss Mr Cruickshank I set each of them out in full as Annexures 1 and 2 respectively attached to this judgment.

[56] As already noted, it was not until 16 July 2009 that Mr Cruickshank ascertained for the first time that the intended MIT/Unitec letter had, on Mr Richardson's instructions, not been sent to the ITPQ. It now appears that Mr Richardson took steps to prevent the sending of the letter after the meeting between the ATT and ITO on 7 July 2009. Mr Cruickshank says that the letters he wrote to employers and apprentices were sent on his understanding that the joint MIT/Unitec letter had gone to the ITPQ. He claims that if he had been told on 7 or 8 July 2009 that the combined MIT/Unitec letter was not to be sent, he may not have sent the letters to the employers and apprentices as he did.

[57] Also on 10 July 2009 Mr Cruickshank requested a meeting with Mr Richardson to discuss the "urgent appointment of a training trust manager". Mr

Richardson declined to meet at the time proposed by Mr Cruickshank because he was otherwise engaged and added to his response that he would not consider the appointment of a training trust manager until Unitec had engaged in meaningful discussions with the ITO.

[58] Staff of Mr Cruickshank's department met with the ATT and ITO on 13 July 2009 about Unitec's plans and strategies. Before they did so, Mr Cruickshank had advised them by email that meetings should be conducted in a professional manner, although the defendant now says that this was coded advice that staff should ask difficult questions and challenge the ITO about the value of its programme.

[59] Email communications between Messrs Cruickshank and Richardson on 16 July 2009, although some six days after the plaintiff sent out the letters that resulted in his dismissal, are instructive about their states of mind at the time. They were still then uncontaminated by the events which transpired later on that day after receipt by Unitec's CEO of the ITO's solicitors' letter as a result of which Mr Cruickshank first became aware of an allegation of misconduct against him and Mr Richardson was first alerted to this.

[60] At 8.49 am on 16 July 2009 Mr Cruickshank emailed Mr Richardson about the former's recent awareness that the combined MIT/Unitec letter had not been sent to the ITPQ on Mr Richardson's instruction. Mr Cruickshank continued to be concerned about what he described as the "ITO unapproved programme" and said that "This is serious and urgent, and in light of events this past two weeks puts us in a very vulnerable situation". Mr Cruickshank complained of a lack of any response by Unitec to what he described as "this sort of sustained attack" and insisted that the legality of the ITO's programme had to be determined.

[61] Mr Richardson's response later that morning was to suggest a discussion on the following day with Mr Cruickshank. The plaintiff wrote back a little more than 15 minutes later saying:

> This is stretching out, and is far more urgent than your actions seem to indicate. ITPQ have got to get involved here, and if Unitec will not do it, then I will have to involve them by other means.

[62] Mr Richardson's response mid-afternoon was testy but firm:

> Garry, how many times do I need to say it!
>
> We will engage with the ITO and investigate the possibility of delivering their programme!
>
> We will stop the antagonistic approach that seems to be taken by the Plumbing and Gasfitting Department against the ITO!
>
> I have stopped the letters [the proposed MIT/Unitec letter to the ITPQ] so that we can engage in a meaningful way with the ITO.
>
> Please engage in this process with the professionalism required.
>
> If you are unhappy with this direction you are more than welcome to talk it over with me.

[63] The last exchange of that day unaffected by the arrival shortly thereafter of the ITO's solicitors' letter that led directly to the plaintiff's suspension and eventual dismissal, was a lengthier email from Mr Cruickshank to Mr Richardson sent at 4.10 pm. It reasserted that there should be a determination of the legitimacy of the ITO "unapproved programme"; it denied that this questioning was antagonistic; and it asserted that Unitec and its staff had been attacked blatantly and openly over many years including challenges to the legitimacy of its programmes. Mr Cruickshank questioned how involving the ITPQ was unprofessional and how doing so would prevent Unitec from engaging with the ITO. Mr Cruickshank asserted that Unitec could not and should not engage with the ITO until after the ITPQ had been involved and to do otherwise would weaken Unitec's position. Mr Cruickshank continued:

> That is why they (the ITO) will use every trick in the book to filibuster and delay any meaningful discussion, which they are really not interested in.
>
> The ITO has spent nearly 10 years undermining Unitec, including several approaches to the Government (including several direct approaches to Ministers) to have our accreditation and funding removed. The ITO does not want us to involve ITPQ or NZQA, as they are fully aware that their programme meets none of the requirements for course approval, and that they are using unaccredited providers to run it. All the more reason for doing it.
>
> I am not sure that you understand that a full adoption of the ITO system would cost us nearly 200 EFTS and result in at least 6 staff being laid off overnight, a situation I do not intend to let happen without a fight. Engagement from a position of weakness on the grounds (as I understand it) that they may be offended or upset, is no reason at all.

[64] Later on the same afternoon, 16 July 2009, Mr Cruickshank was called to a meeting in the office of the Head of Human Resource at Unitec, Peter Wulff. Mr Cruickshank was given a copy of a letter recently received that afternoon from the ITO's solicitors claiming that his letters to employers and apprentices contained several serious factual errors and were defamatory of the ITO. The solicitors' letter specified four statements which were claimed to be false or misleading and threatened legal action against Unitec unless immediate action was taken. The solicitors' letter was dated 16 July 2009 and had been sent to Unitec's Chief Executive, Dr Ede, by email at about 3 pm that afternoon. Also handed to Mr Cruickshank at that meeting late on 16 July 2009 was a letter suspending his employment with immediate effect.

[65] The content of the solicitors' letter is also at the heart of this case and I attach it as Annexure 3 to this judgment.

[66] Unitec's reaction to the ITO's solicitors' letter was both very rapid and defensive. To say that it was overborne by the threats of legal action against it would be to go too far, but its response was affected significantly by the important negotiations it was having with the ITO and the sensitive stage at which these then were, in addition to the very assertive tone of the solicitors' letter and the threat of legal action. Because it considered that it needed to shut down any further divisive and damaging conduct on the part of Mr Cruickshank, Unitec both determined that he should be suspended from his employment immediately and that a conciliatory response from Unitec should be made as soon as possible to the ITO to control and minimise further damage. To say that its response to the ITO's solicitors was submissive would also be excessive, but it was nevertheless very anxious to accommodate the ITO's demands and promptly.

[67] Mr Cruickshank, however, believed that the ITO's solicitors' letter contained a number of errors that he could explain satisfactorily to Unitec and sought an opportunity to do so. He was asked for a list of the recipients of the employer/apprentice letters so that a letter of retraction could be sent by Unitec. Mr Cruickshank asserted that no letter of retraction should be sent until Unitec determined whether his letters contained any false statements. He advised Mr Wulff

that any retraction letter sent prematurely would predetermine Unitec's investigation but Mr Wulff assured him that this would not be so. Mr Cruickshank nevertheless provided, or arranged to have provided, lists of those who had been sent his letters of 9 and 10 July 2009.

[68] Mr Cruickshank was suspended pending investigation into allegations of serious misconduct (unacceptable professional behaviour) against him and, in particular, relating to the contents of his two letters being improper conduct in an official capacity and bringing the standing of his profession and/or Unitec into disrepute.

[69] On 17 July 2009 Mr Cruickshank formally refuted the allegations in the ITO's solicitors' letter and asserted to his employer his ability to establish that every statement in his letters to employers and apprentices was true and justified. He reiterated his point made orally on the previous day that a retraction by Unitec would be considered by him to be a predetermination of the employer's inquiries into the alleged misconduct against him. Mr Wulff in turn reiterated his view that this would not be so, however. Mr Cruickshank later raised a personal grievance alleging that his suspension was an unjustified disadvantage in his employment.

[70] The employer's inquiry continued with an investigation meeting on 23 July 2009 before which Mr Cruickshank was sent Mr Richardson's written account of events and a number of emails. The employer appointed the Executive Dean of its Faculty of Creative Industry and Business (Leon de Wet Fourie) to be its investigator although it was not then clear who would make any decisions affecting Mr Cruickshank as a result of those investigations.

[71] Mr Cruickshank, together with another member of staff as a support person, attended the first investigation meeting with Dr Fourie on 23 July 2009. There he was asked about 40 of a list of 48 questions which Dr Fourie had prepared in advance and he did his best to answer these. He also presented a prepared written response to the allegations of which he had been made aware previously in the letter suspending him dated 16 July 2009. The nub of Mr Cruickshank's defence was that the contents of his letters to employers and apprentices were correct and justifiable

and the letters were sent with the knowledge and consent or acquiescence of Mr Richardson. Mr Cruickshank said that he sent the letters in Unitec's best interests. He said that the ITO's solicitors' letter was unfounded and reiterated that the statements he had made were entirely correct and factual. Mr Cruickshank complained that although he was the Head of Department, he had been increasingly isolated from Unitec's decision-making processes and that relevant agreed strategies had been cancelled unilaterally by Mr Richardson.

[72] Dr Fourie's further investigations over following days included inquiries with Unitec's in-house Marketing Director which confirmed that Mr Cruickshank's communications would not have been the institution's way of marketing itself to students or employers, actual or potential. That eventuated because Mr Cruickshank said that a purpose of his letters was to persuade apprentices and their employers to remain with or to come to Unitec. This conclusion was passed on to Mr Cruickshank.

[73] There was a further meeting between Dr Fourie and Mr Wulff (for Unitec) with Mr Cruickshank and his representative on 5 August 2009 at which Dr Fourie presented written preliminary findings that Mr Cruickshank's conduct had been improper and his behaviour brought the standing of his profession and Unitec into disrepute. At that time, also, Dr Fourie identified summary dismissal as the appropriate sanction but sought Mr Cruickshank's response to these preliminary conclusions.

[74] On 24 August 2009 Mr Cruickshank submitted a lengthy (41 page) written response which included his concerns about aspects of the inquiry process. These included, in particular, that new allegations were being formulated by Unitec that had not been its concern at the outset or put to him then. Mr Cruickshank attached an extensive file of material relating to the history of plumbing and gasfitting training at Unitec and more generally over previous years.

[75] Dr Fourie's response was a letter dated 8 September 2009 offering Mr Cruickshank an opportunity to respond to matters which he, the plaintiff, considered to be new although without Unitec conceding that they were so.

[76] On 16 September 2009 Mr Cruickshank responded to Dr Fourie in writing following which Unitec offered the opportunity for a meeting with Mr Cruickshank in the weeks beginning 11 or 21 September 2009. By an email from his representative on 24 September 2009, however, Mr Cruickshank advised that he had fully addressed all issues in which a decision was to be made by Unitec without the need for a further meeting.

[77] In a lengthy (14 page) letter dated 28 September 2009, Dr Fourie confirmed his earlier preliminary view that Mr Cruickshank's sending of the two forms of letter amounted to serious misconduct and "recommended" summary dismissal. On the same date, 28 September 2009, Mr Wulff wrote to Mr Cruickshank confirming that outcome and the plaintiff's employment did end summarily on that day, 28 September 2009.

The terms and conditions of the plaintiff's employment

[78] These were in an individual employment agreement and included a requirement that Unitec would act as a good employer (as defined by s 56 of the State Sector Act 1988) in all dealings with Mr Cruickshank. He, in return, agreed to abide by the policies, codes of conduct, and similar expectations of employees promulgated by Unitec's Council or its Chief Executive. Suspension of Mr Cruickshank's employment was provided for expressly as was termination of his employment without notice. Mr Cruickshank was to provide leadership in the delivery of high quality student learning experiences. He was to enhance the reputation and academic standing of his discipline including promoting and leading initiatives supporting Unitec's academic strategies and contributing to the academic leadership of the defendant as a whole. Mr Cruickshank was required to foster external stakeholder relationships.

[79] As noted, Mr Cruickshank was bound by Unitec's Code of Conduct. This recognised his rights to academic freedoms in a manner consistent with a responsible and honest search for, and dissemination of, knowledge and truth. The Code acknowledged that Mr Cruickshank's academic freedom included the traditional academic role of challenging held beliefs, policies and structures within his area of

expertise. The Code also set out Unitec's responsibilities to act as a good employer including to treat staff fairly and properly, to undertake open dialogue, and to be supportive in resolving problems.

[80] Unitec's disciplinary policies and procedures, to which both parties were subject, included a "Principle" that "Any necessary remedial action will be taken as soon as is reasonably practicable after the event."[5] Addressing the fairness of the consequences of misconduct in employment, the employer was to take account of a number of features including the nature of the offence/conduct/action/omission/behaviour, the staff member's work record, the circumstances, and any extenuating factors.[6]

[81] "Serious Misconduct" was defined[7] as:

> Serious misconduct may warrant dismissal without notice and is behaviour which:
>
> i) Undermines or amounts or amounts to a serious breach or continued neglect of the contractual relationship between the staff member and Unitec; and/or
>
> ii) Seriously threatens the well-being of Unitec, the staff, students, clients, suppliers or any other person having dealings with Unitec; and/or
>
> iii) Is likely to bring the staff member personally or Unitec into disrepute or which results in a serious continuing incompatibility between the parties.

[82] Examples of serious misconduct included "Improper conduct in a staff member's official capacity"[8] and "Conduct or behaviour that may bring the standing of his/her profession and/or Unitec into disrepute".[9]

[83] The process for investigations of alleged misconduct was dealt with by cl 5 of the policy. This provided for an interview of the staff member to give him or her an opportunity to explain or comment, interviews of other people (if appropriate), and a check of records or verification of facts by other means (if appropriate). The policy

---

[5] Clause 2.1.
[6] Clause 2.3.
[7] At cl 3.3.
[8] Appendix 2, cl 11.
[9] Appendix 2, cl 15.

also provided that no disciplinary action would be decided or taken before the relevant facts had been considered.

[84] Clause 5 of the policy contained a number of specified rights of staff members. These included prior warning in writing of an allegation being investigated and the type of disciplinary action that could result.

[85] Suspension of employees was covered by cl 7 of the disciplinary policy. It is, therefore, important to set out in full the policy's provisions in relation to suspension given that the propriety of this is challenged by him in his case.

> Where Unitec has reason to believe a staff member may have engaged in serious misconduct or been charged with or convicted of a criminal offence, Unitec may suspend the staff member in order to facilitate further investigation of the matter prior to making any decision about whether disciplinary action is necessary and if so, what disciplinary action is appropriate.
>
> Suspension may be considered appropriate where an allegation of the kind described above has been made or initial indications are that the above may have occurred; and
>
> i) the continued presence of the staff member is likely to cause concern to Unitec staff, students and/or members of the public;
> ii) it appears desirable to take the heat out of a situation where other staff members are involved in the matter to be investigated;
> iii) there is a significant possibility of the investigation being hindered if the staff member remains at work while it is undertaken; and/or
> iv) the allegation is such that work cannot continue until the allegation is investigated and/or rebutted.

[86] The power to suspend an employee was delegated to Unitec's Executive Deans by cl 7.3 of the policy.

[87] Dismissal was covered by cl 9 and included, at cl 9.1(iii), a requirement for the employer to inform the staff member of the reasons for the dismissal.

[88] Finally, in relation to the policy, cl 9.2 authorised dismissal decisions to be delegated to the Chief Executive and the Executive Deans of Unitec.

[89] Another important ingredient in all employment relationships and for consideration when they end in a dismissal, as this one did, is the statutory good faith

requirements contained in s 4(1A) of the Act. These include, under s 4(1A)(b), a requirement that parties be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative. Even more particularly, s 4(1A)(c) requires an employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to that affected employee access to information, relevant to the continuation of the employee's employment, about the decision and an opportunity to comment on the information before the decision is made.

Personal grievance tests

[90] In determining both whether Mr Cruickshank was disadvantaged unjustifiably in his employment and subsequently dismissed unjustifiably, s 103A (as it was in 2009 but is no longer) is applicable. The tests are whether what the employer did, and how the employer did it, were what a fair and reasonable employer would have done, and how such an employer would have done so, in all the relevant circumstances. The application of these (now superseded tests) is expanded upon in the judgment of the full Court in *Air New Zealand Ltd v V*.[10]

The plaintiff's personal grievances

[91] Mr Cruickshank's case is that the Chief Executive of Unitec ought to have taken, but did not take, time to consider the ramifications of the proposals of ATT and ITO, championed his own Institute's programme and supported his staff. Instead, the plaintiff says the employer suspended precipitately, and then dismissed summarily, his Head of Department because of embarrassment and a fear of legal proceedings threatened erroneously by the ITO.

[92] Mr Cruickshank's case goes further by saying that on a proper interpretation of the Industry Training Act 1992, the ITO in this case has no power to develop a training programme so that the whole foundation on which the controversy was based was flawed fatally and that there could not, in law, have been the alternative

[10] [2009] ERNZ 185.

programme to Unitec's propounded by the ITO. I have already noted this Court's role which does not include decision of such issues.

[93] It is a central plank of Mr Cruickshank's case that Unitec's training programme was developed by well qualified and dedicated staff over a long period in new facilities using state of the art teaching methods and at great cost to Unitec. Again, however, it is not this Court's role to determine the merits of those contentions and that the ITO's competitor programmes were Unitec's antitheses as Mr Cruickshank claimed. There is no doubt that a passionate belief in this drove Mr Cruickshank to write the letters that brought about his employment demise, but a court is not well placed to make a technical professional judgment about the respective merits of competing practical academic programmes.

[94] The plaintiff says in this case that his suspension was flawed because the decision to do so was made before he had any opportunity of being heard either on the question of suspension or on the substantive allegations of alleged misconduct. It was, he says, unfairly and unjustifiably predetermined.

[95] The plaintiff also says that he was marginalised in his employment which constituted unjustified disadvantage to it. His case is that he was not included in relevant meetings, decisions, and correspondence although the subject of these was a proposal that had the potential to impact on Unitec employees including Mr Cruickshank in particular.

[96] The plaintiff says his dismissal was unjustifiable because he did not commit serious misconduct, his dismissal was predetermined and procedurally unfair, and Unitec failed to consider other sanctions short of dismissal. I shall return to the detail of these contentions later.

The suspension personal grievance

[97] Quite apart from the strong case of predetermination in breach of s 103A of the Act, Mr Cruickshank's argument is that even the reasons given in evidence by Dr Ede did not meet the tests justifying suspension in Unitec's disciplinary policy. The

Chief Executive's reasons included the seriousness of the alleged misconduct, the potential for reputation damage to Unitec and the risk that Mr Cruickshank might have engaged in further similar behaviour if not suspended.

[98] Clause 7 of the disciplinary policy already summarised, however, allows for suspension to facilitate further investigation of a disciplinary allegation in four specified situations. Mr Cruickshank's case is that Dr Ede's reasons did not amount to any of those four grounds to which Unitec bound itself in cl 7 of its disciplinary policy. Additionally, the plaintiff's case is that the decision to suspend was taken impulsively and hastily and was an unreasonable over-reaction to a threatening letter from solicitors for the ITO. The suspension was effected within two hours of the receipt of that letter and the decision to suspend was made in even less time than that. The decision to suspend was made before Mr Cruickshank had any opportunity to be heard about it and even when he had that opportunity belatedly, the die was already cast and his input was not able to make any difference.

[99] The plaintiff's suspension lasted from 16 until 31 July 2009 and was superseded by an agreed period of leave reached on 5 August 2009. The plaintiff's case is, therefore, that the suspension was for more than a short or reasonable period and was consequently the more damaging to Mr Cruickshank.

[100] Mr Cruickshank says that he was hurt and humiliated by the suspension and although, as his counsel put it, he may have appeared to "bury his emotions as plumbers from Tokoroa do", the consequences were no less real and significant.

Decision – suspension personal grievance

[101] As the plaintiff notes, the defendant accepts that the suspension was unjustified in the sense that suspension was not how a fair and reasonable employer in all the circumstances would have dealt with Mr Cruickshank upon receipt of the ITO's solicitors' letter, even if it might have subsequently suspended him justifiably.

[102] It is surprising that Unitec decided to suspend Mr Cruickshank within about an hour of receiving the solicitors' letter and did so having sought advice from its in-

house professional human resources manager who claims not to have been aware of the need to have taken into account Mr Cruickshank's response to its view that his immediate suspension was warranted. Accepting that excuse on its face as I do, it requires the Court to scrutinise carefully the fairness and reasonableness of the subsequent processes undertaken by Unitec that led to Mr Cruickshank's dismissal. Mr Cruickshank would no doubt ask rhetorically: If my employer could have made such an elementary error in respect of my suspension, what else might it have done in breach of well-known and long-established requirements for fair process affecting my employer?

[103] Case law in relation to suspension confirms the necessity in almost all cases for procedural fairness in what will in many cases be a very significant factor in an employee's continued employment. The statutory good faith obligations set out above apply to a potential suspension: *Sefo v Sealord Shellfish Ltd*.[11]

[104] And finally, as was said by the Court of Appeal (Richardson J) as long ago as in *Birss v Secretary for Justice*:[12]

> Suspension is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary.

[105] I agree with Mr Campbell for the plaintiff that the reasons proffered in evidence by Dr Ede for Mr Cruickshank's suspension did not accord with those contained in Unitec's disciplinary policy (cl 7) to which Unitec had bound itself. This describes four situations in which suspension might be appropriate to facilitate further investigation of a matter before deciding whether disciplinary action is necessary as set out at [85] above and none was applicable here.

[106] Next, the suspension took effect immediately on 16 July 2009 and it was only on the afternoon of 31 July 2009 that Mr Cruickshank was advised that he could return to work although he subsequently agreed to take leave. I accept therefore that

---

[11] [2008] ERNZ 178.
[12] [1984] 1 NZLR 513 (CA) at521.

the suspension was for a substantial and significant period and distress and humiliation was caused to Mr Cruickshank.

[107] I agree with the Authority that Mr Cruickshank's suspension from his employment was unjustified. It was not how a fair and reasonable employer would have dealt with the admittedly difficult circumstances of the receipt by Unitec of the ITO's solicitors' letter.

[108] The decision to suspend Mr Cruickshank was not one taken by the employer with an open mind but was predetermined. A fair and reasonable employer in all the circumstances would have allowed Mr Cruickshank to be heard before both deciding whether to suspend him and agreeing with the ITO's position. There was no risk to Unitec commensurate with the immediate suspension that occurred on 16 July 2009.

[109] The ITO's solicitors' letter was perceived by Unitec as putting it under pressure to make a rapid and decisive response. That was so, but a fair and reasonable employer, in all the circumstances, should and would have resisted that pressure for immediate and decisive action. Unitec did not. In its haste to reassure the ITO and to illustrate that it had taken the prompt decisive action it thought was expected of it, it suspended Mr Cruickshank when it was not entitled to have done so in law and in the manner in which it did.

[110] Unitec considered it was necessary to show that it had taken firm action against Mr Cruickshank (suspending him) to reinforce and make more credible the conciliatory response it felt it needed to make to the ITO. But it would not have affected Unitec's position to have acknowledged receipt of the ITO's solicitors' letter, to have expressed its acceptance of the seriousness of the situation, but also to have explained that it was required to undertake some inquiries with Mr Cruickshank before it could respond substantively and meaningfully to the ITO's serious allegations. In its attempt to preserve and enhance its position in the face of the threat of legal action by the ITO, Unitec breached its legal obligations to Mr Cruickshank in a way that a fair and reasonable employer would not have done in the circumstances.

[111] I agree with the Authority that Mr Cruickshank's suspension was an unjustified disadvantage of him in his employment (a personal grievance) that warrants a remedy. But I go further than the Authority did in this regard. The suspension, the manner of and reasons for it, and its continuation for a period of almost three weeks, infected Unitec's investigative and decision making process over that period which led to Mr Cruickshank's summary dismissal. The suspension was not, and cannot be, such an isolated event as the Authority concluded it was. Although unjustified in itself, it was not irrelevant when considering the justification for Mr Cruickshank's dismissal. It is appropriate to address those consequences of the suspension when considering justification for dismissal as I do subsequently.

[112] I will address remedies for this unjustified disadvantage grievance at the conclusion of this judgment.

Unjustified disadvantage grievance – "marginalisation"

[113] Mr Cruickshank relies on a breach by Unitec of s 4(4)(d) of the Act in claiming that his treatment by Unitec at relevant times amounted to "a proposal by an employer that might impact on the employer's employees …". As such, Unitec owed Mr Cruickshank a duty of the good faith which it breached to his unjustified disadvantage. He relies on a series of events to support this contention. These include:

- his exclusion from the 7 July 2009 meeting with the ITO and relevant predecessor meetings;
- that he was improperly informed of the outcome of the 7 July 2009 meeting;
- that he was not told of Mr Richardson's decision that the joint MIT/Unitec letter should not be sent to the ITPQ;
- that he was not advised of Dr Ede's email dated 13 July 2009;

- that he was not consulted on Unitec's proposal to engage with the ITO; and

- that he was not consulted before Unitec's retraction letter was sent to the ITO.

[114] Mr Cruickshank claims that he was isolated and marginalised by this treatment of him by his employer.

[115] The breach is said to have been of Unitec's s 4 obligations to deal with Mr Cruickshank in good faith, with trust and confidence, and to be active, constructive, responsive and communicative with him including by the provision of information and an opportunity to comment.

[116] The plaintiff says that Unitec's proposal to engage with the ITO placed jobs at risk and it was a proposal about which Unitec ought to have consulted with Mr Cruickshank and its other relevant staff.

[117] Mr Cruickshank relies on Dr Ede's acceptance in cross-examination that Unitec's communication of information to Mr Cruickshank, particularly in regard to the joint MIT/Unitec proposed letter to the ITPQ, could have been better handled.

[118] No specific remedy is sought by the plaintiff in respect of these alleged breaches of good faith.

Decision – marginalisation personal grievance

[119] I do not accept the plaintiff's claim to this personal grievance. A fair and reasonable employer would, in all the circumstances, not have acted differently except in minor respects which do not cause Unitec's conduct to amount to unjustified disadvantage of Mr Cruickshank.

[120] Given the plaintiff's long history of strident criticism of the ITO and the request from ATT that the tripartite meeting between it, the ITO and Unitec be at a senior managerial level (by implication excluding Mr Cruickshank), it was

reasonable for Unitec not to have invited him to attend the 7 July 2009 meeting. Unitec met its obligations to Mr Cruickshank in this regard by informing him that the meeting was to take place and by informing him subsequently of what had occurred. He was also consulted about how Unitec should address issues to be raised, and his advice was taken into account by his employer. I do not accept that Mr Cruickshank was not properly or sufficiently informed of the outcome of the meeting of 7 July 2009; he was told sufficiently of the general nature of what was a still tentative process towards future cooperation but subject to the ascertainment of relevant detail.

[121] I do not accept that Dr Ede was obliged to ensure that Mr Cruickshank received or otherwise knew about his email of 13 July 2009. This was an instruction to Mr Cruickshank's line manager and in pursuance of a reasonable method of managing a large, busy and complex organisation.

[122] Nor is it reasonable to assert that Unitec was obliged to consult with Mr Cruickshank on its proposal to engage with the ITO. Setting the institution's broad direction was not only a matter for its Chief Executive but also Mr Cruickshank would have been consulted, with others, about the detail of this strategy in due course. His track record on the issue would almost certainly have delayed (at best) or even hindered this initiative which the Chief Executive was entitled to take.

[123] Mr Cruickshank was aware of the Chief Executive's intention to send a retraction letter to the ITO. Indeed, he argued strongly, but ultimately unsuccessfully, that it should not be sent. So he cannot say that he was not consulted about the sending out of the retraction letter which was, in any event, ultimately a matter for Unitec itself. Whilst not supporting a separate grievance, the employer's response will nevertheless be a relevant factor when determining justification for dismissal.

[124] The only element of this grievance that is sustainable (indeed Unitec admitted this failing) was the absence of advice to him that the proposed joint MIT/Unitec letter to the ITPQ had been the subject of a direction from Unitec that it was not to be sent. Mr Cruickshank assumed, in the absence of advice to this effect, that it

would be sent and, by 9 and 10 July 2009, that it had been sent. This failure alone was, however, insufficient to constitute an isolation or marginalisation of him that may have amounted to an unjustified disadvantage in his employment and, therefore, a personal grievance. It is, nevertheless, a significant feature of the dismissal personal grievance and I address it further in that context.

[125] In these circumstances, this grievance claim is not upheld.

Dismissal – the case for the plaintiff

[126] This claim is built upon, and is woven inextricably with, an evaluation of the merits of the ITO's courses and of the alleged superiority of Unitec's by comparison. Mr Campbell's strong rhetoric in closing submissions was that Mr Cruickshank did what any loyal and dedicated employee would and should have done to promote his employer's interests and to identify and publicise the faults in a competitor's.

[127] Counsel for the plaintiff submitted that the real reason for Mr Cruickshank's dismissal was that he embarrassed Unitec's Chief Executive who had to attempt to defend an indefensible educational decision to work cooperatively with the ITO. Mr Campbell invited the Court to determine the lawfulness of the ITO's programme. For reasons already given, however, it is necessary to dissect these issues and to focus only on the statutory tests under s 103A for justification of dismissal.

[128] Next, the plaintiff said that the summary dismissal of an academic employee in a tertiary institution is a serious matter because such people hold special places in society, have obligations to the community at large as well as to their employer, and have protections which are enshrined in statute. They are also said to have obligations to their students, to the employers of their apprentices, and to their academic profession, as well as to the institution that employs them. These allegiances are said sometimes not to be in harmony with each other so that it cannot be solely the employer's and employee's interests that are for consideration.

[129] Mr Campbell said that Mr Cruickshank was summarily dismissed over a "nuance of meaning" in the interpretation of which Unitec was in error. Counsel

submitted that the plaintiff should not have been dismissed summarily because he may have embarrassed his employer and that any serious misconduct alleged in these circumstances must go to the root of the employment relationship. Counsel submitted that even if there was serious misconduct, the employer must not move irresistibly from that conclusion to summary dismissal but must, rather, adopt and apply a broader concept of justice and fairness under the former s 103A. Mr Campbell submitted that not only does Unitec's Code of Conduct recognise this requirement, but its HR policy stipulates it.

[130] Mr Cruickshank says that not only did he not misconduct himself seriously as was alleged by Unitec, but also that there was no other serious misconduct on his part justifying dismissal.

[131] Focusing on the content of the two letters (to employers and apprentices), he contends that Unitec's allegation that these contained false statements and were highly misleading in a number of material respects, is false. He submits that the employer's suspension letter of 16 July 2009 (with the ITO's solicitors' letter attached) set out four specific allegations of conduct which may at worst have constituted serious misconduct, but no other behaviour was said by Unitec to have done so in relation to those letters.

[132] As to the ITO's first complaint that there was a categorical statement in the letter to the employers (and that it was implicit in the letter to the trainees), that the ITO's national certificate was not approved by NZQA, Mr Cruickshank says this was false. He says that this was neither expressed nor implicit in either letter. He points to his statement in the letter to employers that: "This programme has not been subjected to the approval process required for delivery under NZQA guidelines." He says that in his letter to students he wrote that the "… **The Unitec programme**[13] is fully moderated and approved through the NZQA accreditation and approval system. … The ITO programme does not meet this criteria …".

[133] Mr Cruickshank denies that the false statements alleged by the ITO are contained in either letter. He says that the evidence establishes that no ITO

[13] Original emphasis.

programmes have been approved and indeed ITOs are not "providers" and cannot therefore have courses approved for them by NZQA or be accredited by NZQA to offer courses themselves. By contrast, Mr Cruickshank says that Unitec's relevant programmes have been approved.

[134] Mr Cruickshank points to the evidence of Dr Fourie who conceded that the plaintiff's statements were "technically correct but misleading" in the sense that the ITO's courses have not been approved because they cannot be approved. Rather, the plaintiff says the ITO's role is to arrange for providers (such as Unitec) to deliver unit standards through short courses. Mr Cruickshank says that he was nothing other than correct to point out that the ITO was seeking to deliver a programme but this would have been unapprovable and, therefore, "unapproved".

[135] Turning to the second of the ITO's complaints (the implication in the letter that student loans were not available to apprentices enrolled in ITO courses because these were not approved), the plaintiff says that this too is false. He says that his statement was correct because student loans are available for approved programmes and to those students who sign contracts with the providers of those approved programmes. He points to cl 18 of the standard Studylink contract which defines a course for which a loan is available as meaning "a course that has been approved for student loan purposes by the Tertiary Education Commission, and includes each programme and component of that course." Mr Richardson confirmed in his email to Dr Ede on 3 July 2009 that student loans were not available for ITO courses. Mr Cruickshank says that not only was his statement not false, but it was not misleading as Dr Fourie appeared to conclude because, Dr Fourie said, it gave an incorrect reason for the loans not being available to ITO students. Mr Cruickshank says that the important part of the advice to students was the question of availability or unavailability of a student loan, not the reasons behind that.

[136] The ITO's third complaint was that Mr Cruickshank's letter to the employers implied that the only provider contracted to deliver training to ITO apprentices was a private training establishment. The ITO said that this was a false implication but Mr Cruickshank says that he did not either say or imply this. He refers to the words of his letter including that employers may "wish to consider where the training may

take place, with the ITO choosing to utilise the services of a Private Provider …". Mr Cruickshank says that the letter, sent to employers in the Auckland region, relied on a statement made by the ITO in its own newsletter of March 2009 that a private provider known as G & H Training was to start delivering block courses in the Auckland region that year. Further, Mr Cruickshank says that in a subsequent newsletter released in June 2009, the ITO announced that trainees had started at G & H Training in Auckland and that this provider would cater for ITO trainees in the Auckland and broader northern areas. Mr Cruickshank says that MIT did not offer a programme and was not listed as a provider. His case is that MIT provided one block course in September/October 2008 and that although there were discussions then under way to hold two further block courses in October/November 2009, no formal agreement had been entered into with MIT at the relevant time.

[137] Mr Fourie's conclusion that the plaintiff's statements were misleading because he failed to make it clear that he was referring to the Auckland region and failed to mention that there were discussions with MIT about possible block courses later that year, is said to be unsustainable.

[138] The ITO's fourth complaint was that Mr Cruickshank's letter to employers stated falsely that Unitec was able to provide training to apprentices throughout New Zealand and that this was contrary to a TEC prohibition on such providers operating out of their regions. Mr Cruickshank points out that Unitec did not refer to this complaint in its retraction letter to the ITO, did not raise this allegation with him at the investigation meeting on 23 July 2009, and did not refer to it in the preliminary or final recommendations leading to his dismissal. He says that the evidence establishes that the ITO's allegation was wrong and that there is nothing to prohibit students in other regions in New Zealand from enrolling in Unitec courses. It appears that it is now common ground between the parties that this ITO allegation was wrong and Mr Cruickshank's statement was correct.

[139] Mr Cruickshank's case is that the only allegations of misconduct that were properly put to him were those set out in Unitec's suspension letter and just summarised above. Alternatively, however, the plaintiff's case addresses other

allegations that arose subsequently in case the Court considers that these are properly for consideration.

[140] First, Mr Cruickshank says that Unitec's conclusion that he sent out the letters of 9 and 10 July 2009, knowing that Unitec was to engage in reconciliation discussions with the ITO, was not one of the preliminary findings against him and recommendations that led to his dismissal and that, therefore, he was not able to comment on it directly.

[141] Mr Campbell makes the persuasive submission that it was Mr Richardson who signed the suspension letter and, although it was prepared by Mr Wulff, Mr Richardson was (or at least ought to have been) satisfied of the accuracy of its contents. Mr Richardson was, at the time he signed the suspension letter, the only person, apart from Mr Cruickshank, who had first-hand knowledge of the discussions between those two men on 7 and 8 July 2009. Mr Cruickshank invites the Court to find that it would have been probable that if Mr Richardson had instructed Mr Cruickshank not to send the letters as is now Unitec's case, he would have included such a strong point in the suspension letter.

[142] "Insubordination" is a specified serious misconduct, indeed the first mentioned, in the defendant's HR policy. As Mr Campbell submitted, in the suspension letter of 16 July 2009 Mr Richardson directed the plaintiff not to copy the solicitors' letter to others and gave other similarly unequivocal directions to Mr Cruickshank. In these circumstances, the plaintiff says that it is not open for Unitec to now say (at least persuasively) that Mr Richardson instructed Mr Cruickshank not to send the letters and that the plaintiff's account of his dealings with Mr Richardson in this regard should not be preferred to resolve the stark contradictions in the evidence given to the Court. The plaintiff's case is that it is only the content of the correspondence in these circumstances that can be relied on by Unitec and, as Mr Campbell submitted, when that content is examined critically, it does not support the interpretation that Dr Ede and his senior managers ascribed to it.

[143] Next, the plaintiff says that Unitec's conclusion that Mr Cruickshank's letters of 9 and 10 July 2009 brought it into disrepute is unsupported by any inquiry or evidence of such disrepute.

[144] Turning to what the plaintiff categorises as Unitec's procedural failures, Mr Campbell submitted first that the dismissal decision was predetermined by the employer when it decided, on 16 July 2009, to send a retraction letter to the ITO. This letter was sent on 21 July 2009 before there had been any real discussion with Mr Cruickshank about the complaint. The retraction letter assumed that Mr Cruickshank's letters of 9 and 10 July 2009 contained false and misleading statements and, except in one respect, the ITO's allegations made in its solicitors' letter of 16 July 2009 were correct. The retraction letter includes statements by Unitec that Mr Cruickshank's assertions on certain points were incorrect. In these circumstances, counsel submitted that the employer's subsequent investigation and findings were "irrevocably tainted".

[145] Other indications of predetermination are claimed to include that Mr Richardson wanted the plaintiff's department's budget to cover the cost of advertising to replace Mr Cruickshank as Head of Department before the decision was made to dismiss him. Further, the dismissal letter was prepared by Mr Wulff on 25 September 2009 despite Unitec's final findings and recommendations not being completed by Dr Fourie until 28 September 2009.

[146] Other flaws by Unitec are said to include Dr Fourie's failure to obtain and review relevant documentary material including Mr Cruickshank's personnel file, the minutes of Unitec's Plumbing and Gasfitting Advisory Committee of 23 July 2009 (in which the members expressed their support for Mr Cruickshank and determined to send a letter of support to the Chief Executive) and the Committee's letter referred to dated 23 July 2009 recommending Mr Cruickshank's immediate reinstatement.

[147] Next, Mr Campbell says that it was unfair to Mr Cruickshank that he was not given, in advance of the meeting on 23 July 2009, Mr Richardson's list of 48 questions prepared by the latter and which were critical to his investigation. Although Mr Cruickshank agreed to respond to these questions before making his

own statement on that date, he did not know about the list of questions before the meeting or its contents. He was prepared to answer the points brought up in the suspension letter of 16 July 2009 but was unprepared for the broader inquiries posed in Dr Fourie's questions. The plaintiff says that the failure or refusal of the defendant to provide those questions before the meeting was a breach of the statutory obligation to provide information to the plaintiff for his comment, and of general fairness to him.

[148] Next, the plaintiff says that Dr Fourie failed or refused to interview other members of staff or relevant industry people who had potentially relevant information before determining whether the contents of the letters of 9 and 10 July 2009 were false or misleading and whether Mr Cruickshank brought the profession and Unitec into disrepute. In particular, Lorraine Williams, the area co-ordinator for the ATT, would have been able to corroborate what Mr Cruickshank said were his discussions with Mr Richardson on 7 July 2009 about sending the letters, which discussion has transpired to be crucial to the outcome of the case.

[149] Mr Campbell submitted that the documentary evidence at the time (as distinct from the assertions of Unitec's witnesses at trial) indicates that Unitec was in a hurry to conclude its inquiries and, more particularly, to assuage the ITO's combative response to Mr Cruickshank's letters. This is said to have caused the defendant to act unfairly towards Mr Cruickshank.

[150] Next, although its relevant witnesses now say that they took into account Mr Cruickshank's long and largely satisfactory work record as required by its disciplinary policy, there is no reference to these considerations in the very extensive documentation prepared by Unitec that led to his dismissal. Given the comprehensiveness of other documentation about the inquiry and dismissal decision, counsel submitted that the absence of reference to these factors evidences their omission by the defendant.

[151] Mr Campbell emphasised that the decision maker, Dr Fourie, had been at Unitec for less than five months and, without inquiry, had no direct knowledge of these important background factors. Even Dr Ede, Mr Cruickshank's official

employer, had only commenced at Unitec in April 2008, some 16 months before these events. There was no consultation with Mr Cruickshank's previous line managers.

[152] Although required by Unitec's disciplinary policy (cl 2.3(iii)), the "circumstances" of the events were not referred to in its relevant contemporaneous documentation. These, however, included the long history of the relationship between Unitec and the ITO in the course of which the latter had ceased to operate in Auckland and had withdrawn from attempts to develop a national programme.

[153] Next, despite the history of fractious interaction with some people in the ITO, Mr Campbell submitted that Unitec should have taken into account the substantial assistance given by Mr Cruickshank to it from 1997. The relevant background is also said to have included the very short period between the communications about the radical change in the relationship between the ITO and Unitec on 7 and 8 July 2009, and the sending out of the letters on 9 and 10 July 2009. Mr Campbell submitted that lenience towards the plaintiff at a time of significant policy change would have been appropriate, fair and reasonable.

[154] Also relevant, but not considered, counsel submitted, was the absence of Mr Cruickshank's knowledge until 16 July 2009 that Mr Richardson had put on hold or had cancelled on 7 July 2009 the sending of the combined MIT/Unitec letter to ITPQ which signified a change of approach by Unitec but which was not made known to the plaintiff.

[155] Next, counsel submitted there was no apparent consideration of the issue of doubt about whether Mr Richardson had authorised Mr Cruickshank's letters, especially when written communications with employers in a capacity other than host employers was allegedly permitted, or at least not prohibited by Mr Richardson, and oral communications with students by Mr Cruickshank were permitted by Mr Richardson.

[156] Finally in this regard, Mr Campbell submitted that Unitec did not give any or sufficient consideration to the possibility that Mr Richardson, in the knowledge of Dr

Ede's reaction to Mr Cruickshank's letters, crafted his account of events earlier in July 2009 to avoid any sanction against him by Unitec. In particular, counsel submitted that Mr Richardson's written account of the crucial meeting with Mr Cruickshank on 7 July 2009 was only "partial".

[157] Next, counsel for the plaintiff submitted that Dr Fourie's "recommendations" (in fact his reasons for decision) made no reference to any extenuating circumstances as was required, if they existed, by cl 2.3(iv) of Unitec's disciplinary policy. Mr Campbell pointed to a number of circumstances that he said met this qualification of being extenuating including the following.

[158] First, communications and relationships-training for departmental heads including in particular Mr Cruickshank, had not commenced and there was no active mentoring or training of the plaintiff despite the employer's recognition of a need for this in his case. Dismissal in these circumstances was said to have been in breach of Unitec's Code of Conduct which included an obligation to provide support in resolving problems which the defendant had not done.

[159] Next, no account was said to have been taken of the extenuating circumstances of the competing interests of various stakeholders: Unitec took account principally, if not exclusively, of its own interests.

[160] Next, there was said to have been no account taken of either the public interest or the interests of apprentices and employers in the industry in the provision of high quality education. Nor was any account said to have been taken of concerns about the quality of the ITO's "unapproved" programme under NZQA criteria for course approval and accreditation.

[161] Penultimately, no account was said to have been taken of Mr Cruickshank's view that he was acting in the best interests of students, his staff, and the financial interests of Unitec, in particular to preserve EFTS funding. Mr Cruickshank asserted that, as an academic, he had the right to speak out on matters of public interest such as these even if his employer may not have agreed with his views.

[162] Finally, no account was said to have been taken of the possibility that Mr Cruickshank had made an error of judgment in sending out the letters.

[163] Next, the plaintiff attacks the capacity and ability of Dr Fourie to have made, as he claimed, the decision to dismiss Mr Cruickshank. Counsel referred to the consistent references by Dr Fourie in his contemporaneous records to his "recommendations". These references were said to have been inconsistent with his subsequently claimed ability to make Unitec's decision about what was to happen to Mr Cruickshank.

[164] Next, despite Dr Fourie's claim to independence, Mr Campbell submitted that his three discussions with Dr Ede about his "recommendations" tended to indicate that, in reality, it was the Chief Executive who made the decision to dismiss.

[165] In fact, the plaintiff claims that the act of dismissal was not carried out by either Dr Fourie or Dr Ede, both of whom were authorised to do so under Appendix 3 of Unitec's disciplinary policy. Counsel submitted, as is illustrated by documentation, that Dr Fourie made a final recommendation but the announcement of the dismissal was carried out by another employee, Kath Hollins, although using the name of the Human Resources Manager, Mr Wulff.[14] Counsel submitted that Mr Wulff had no authority to dismiss and this was carried out contrary to Unitec's policy.

[166] Next, the plaintiff asserts that the reasons for his dismissal were not given to him as required by cl 9.1(iii) of Unitec's disciplinary policy. These were not in the final recommendations (an error acknowledged by Unitec) or in the dismissal letter.

[167] In fact the plaintiff goes so far as to assert that the real reasons for his dismissal were not put to him at any time. These were said, following the evidence of Dr Ede, to have been a real risk that Mr Cruickshank might engage again in similar conduct. This was said by the defendant to have damaged irreparably his employer's trust and confidence in him. The plaintiff claimed also that his actions were seen as a personal betrayal by him of Dr Ede as Chief Executive.

---

[14] See doc 403.

[168] Mr Campbell described Dr Fourie's investigation as having "a veneer of fairness" but submitted that it was, in reality, a "desk study" for which there was no paper trail record of significant elements of the investigative and decision making process. In all the circumstances, counsel submitted this could reasonably have been expected of Unitec if it had been a fair and reasonable process.

[169] Counsel submitted that Unitec's flawed process led to a faulty conclusion of summary dismissal, a result which a fair and reasonable employer would not have arrived at in all the circumstances at the time the dismissal occurred.

[170] Finally, on the question of liability, Mr Campbell submitted that even if Mr Cruickshank had been guilty of serious misconduct, a fair and reasonable employer would not have dismissed him summarily but, rather, applied sanctions and behavioural directives and safeguards to ensure that there was no repetition. He relies upon the Court's judgments in other cases including *X* (*White*) *v Auckland District Health Board*[15] and *Secretary for Justice v Dodd*.[16] The plaintiff says that alternatives to dismissal were not properly considered by the employer as it was required to do by its own Code of Conduct and disciplinary policy. In this, he also relies on this court's judgment in *Lewis v Howick College Board of Trustees*.[17]

The case for the defendant

[171] Dealing first with the issue of the plaintiff's letters, Mr Cook, for the defendant, submitted that Mr Cruickshank did not tell Mr Richardson in their telephone call on the afternoon of 7 July 2009 that he (the plaintiff) was in the process of writing letters to students and employers and that they would be sent out by 10 July 2009 at the latest. Counsel says that this is reinforced by the evidence of Mr Richardson that if he had been so told by Mr Cruickshank, he would not have endorsed sending letters or, by staying silent, to have led Mr Cruickshank to believe it was acceptable. Pertinently, counsel submits that such a response by Mr Richardson would have been consistent with the way in which he had then recently suspended or cancelled the sending of the proposed joint MIT/Unitec letter to ITPQ.

---

[15] [2007] ERNZ 66.
[16] [2010] NZEmpC 84.
[17] [2010] ERNZ 1.

[172] The fallacy in this argument, however, is that Mr Richardson (despite knowing of the plaintiff's involvement in it) did not advise Mr Cruickshank of his decision that the joint letter should not be sent, although he did communicate this to relevant people at MIT so that the letter was effectively stopped. So it follows, in my assessment, that rather than Mr Richardson's dealing with the proposed joint letter to the ITPQ confirming his assertion that Mr Cruickshank did not tell him on 7 July 2009 of the plaintiff's plans to send out letters to apprentices and employers later that week, it weighs in Mr Cruickshank's favour. That is in the sense that it could not have assured Dr Fourie that Mr Richardson was told these things by Mr Cruickshank.

[173] Nor is it sufficient, as Mr Cook submitted, that the differences between the accounts of Messrs Cruickshank and Richardson about their telephone call on 7 July 2009 may not need to be resolved because it was agreed that they discussed contacting employers and students the next day. What was said and how far Mr Richardson went in that conversation are vital considerations as indeed Mr Cook conceded in his final submissions, although saying that Mr Richardson's evidence should be preferred on this point.

[174] Mr Cook criticised the plaintiff's attempt to corroborate independently his account of the telephone call of 7 July 2009 by the evidence of Lorraine Williams who it is said was present with him when he spoke by telephone to Mr Richardson on 7 July 2009. Ms Williams could only hear what Mr Cruickshank said to whomever he was speaking to when she was there. Mr Cook criticised Ms Williams's evidence in a number of respects. First, he said that she recalled Mr Cruickshank saying on the telephone that the letters could start going out "tomorrow" (8 July 2009) which, counsel submitted, was inherently improbable given that they did not go out until 9 or 10 July 2009.

[175] Next, Mr Cook submitted that Mr Cruickshank could have been speaking to someone other than Mr Richardson. However, I find that is so unlikely as to discount it.

[176] Next, counsel said that Ms Williams's recollection of the telephone call was only prompted first in mid-August 2009 in response to a request by Don Mardle, Mr

Cruickshank's representative, some six weeks after 7 July 2009. Mr Cook submitted that this was to be contrasted with Mr Richardson's account of the call which was contained, first, in his memorandum of 20 July 2009 to Dr Fourie, less than two weeks after 7 July 2009. Finally, Mr Cook submitted that in Mr Cruickshank's first written response of 23 July 2009 to the complaints against him, he makes no mention of telling Mr Richardson on 7 July 2009 that he was going to write any letters: the impression from Mr Cruickshank's written account of 23 July 2009 was that he first mentioned the letters to Mr Richardson on the following day, 8 July 2009.

[177] The defendant accepts that at the meeting between Messrs Richardson and Cruickshank on the morning of 8 July 2009, Mr Cruickshank suggested that Unitec should send letters to ATT host employers and apprentices in an attempt to win them over or back to Unitec and to maintain its share of the Auckland market. The defendant's case is that Mr Richardson's response was that Unitec should not send letters to host employers because they were ATT clients and not Unitec contacts and Mr Cruickshank agreed with this. The defendant's case is that in respect of Mr Cruickshank's proposal to write to students or apprentices, Mr Richardson suggested that the preferable course would be for Mr Cruickshank to speak with those apprentices when they were on Unitec block courses, but again cautioned against sending letters to them.

[178] Mr Richardson conceded, however, that if Mr Cruickshank had spoken to apprentices at their block courses in the same terms as he wrote the letters to them, it was probable that some at least of those apprentices would have spoken to their employers about what Mr Cruickshank had said. So the net effect may have been the same so far as the employers were concerned.

[179] The defendant's case is that Mr Richardson made it clear to Mr Cruickshank that the plaintiff was not to send any letters and that he (Mr Richardson) was not aware of Mr Cruickshank's intention to do so or of his having done so until made aware of that on 16 July 2009. The defendant says that Dr Fourie's finding upholding this position was open to him in view of the fact that Mr Richardson knew that Unitec and its Chief Executive would not have wanted anything to have been done that was inconsistent with the new relationship with the ITO and the ITO's need for reassurance that Unitec was willing to relate to it in good faith.

[180] Mr Cook submitted that Mr Richardson's account of these pertinent events has always been consistent since he first wrote his memorandum to Dr Fourie on 20 July 2009 which is the most contemporaneous record of his 8 July 2009 meeting with Mr Cruickshank.

[181] Contrasted with this, Mr Cook submitted that Mr Cruickshank's accounts of the meeting were inconsistent and relied on what he described as "technical interpretations" of what Mr Richardson said. Counsel for the defendant invited me to find in this regard that Mr Cruickshank's evidence lacked credibility and that he was intent on sending the letters, doing so without regard for Mr Richardson's contrary advice and against the spirit (of which he was aware) of Unitec's new relationship with the ITO.

[182] Mr Cook emphasised that at the 23 July 2009 investigative meeting, Mr Cruickshank, after having initially claimed that Mr Richardson agreed that he could send letters to direct employers of apprentices, conceded that he had been advised by Mr Richardson not to write to the employers. Counsel submitted that Mr Cruickshank's claim in evidence that Mr Richardson did not mention students or caution him against sending letters to them, is directly contrary to his responses in the disciplinary investigation when he recognised that Mr Richardson had told him that it was better to speak to students while they were on block courses. This is said to have been corroborated by the plaintiff's own notes of the 23 July 2009 interview with Dr Fourie and his 24 August 2009 written response. Mr Cook invited me to find Mr Cruickshank's responses during cross-examination trying to explain these contradictions were not credible.

[183] Counsel for the defendant submitted, however, that whatever exchanges there may have been between Messrs Richardson and Cruickshank about whether the letters could be sent, the reality is that despite what Mr Richardson may or may not have said, Mr Cruickshank would probably have sent the letters anyway given his propensity to act independently of his managers' directions.

[184] Mr Cook emphasised the provision in cl 3.3(iii) of Unitec's Disciplinary Policy and Procedures which defines serious misconduct as behaviour which "is likely to bring the staff member personally or Unitec into disrepute or which results

in a serious continuing incompatibility between the parties." Appendix 2 to the policy provides examples of actions that may constitute serious misconduct including:

> 11. Improper conduct in a staff official capacity.
>
> …
>
> 15. Conduct or behaviour that may bring the standing of his/her profession and/or Unitec into disrepute.

[185] Dr Fourie's finding for Unitec was essentially that Mr Cruickshank had committed serious misconduct by sending out the letters of 9 and 10 July 2009 in his capacity as Head of Department; on behalf of Unitec; knowing clearly that Dr Ede and Mr Richardson had shortly beforehand committed Unitec to exploring ways of working cooperatively with the ITO; and following at least a strong indication or even a direction from Mr Richardson not to do so.

[186] Mr Cook submitted that on reading the letters, it is immediately apparent that Mr Cruickshank was seeking to disparage and significantly undermine the ITO and the training it offered as not only inferior and restrictive, but unlawful. It must be serious misconduct by any measure, Mr Cook submitted, to have a head of department writing such letters, purportedly on behalf of Unitec, where the employer had just committed to work cooperatively with the ITO. Unitec was justified in losing trust and confidence in Mr Cruickshank and, Mr Cook submitted, in view of the plaintiff's attempt to justify his actions in various but inconsistent and incredible ways, to still hold tenably to that view.

[187] Addressing the three elements of the 9 and 10 July 2009 letters focused on by Unitec in its investigation of Mr Cruickshank, Mr Cook submitted the following.

[188] As to the assertion by Mr Cruickshank that the ITO programme "has not been subjected to the approval process required for delivery under NZQA guidelines", counsel acknowledged that Dr Fourie recognised that this statement might have been technically correct in the sense that the ITO's programme had not been so subjected. However, his conclusion was that it clearly misled readers to believe that an NZQA approval was required and, because its training programme had not been through NZQA processes, it was unlawful. Unitec's case is, however, that the ITO

qualification is NZQA accredited but the ITO cannot ever have courses approved by NZQA or be accredited to offer courses itself. Unitec acknowledges that it is common and accepted practice for an accredited Institute of Technology or Polytechnic (ITP) such as Unitec to deliver unit standards as requested by an ITO and it also had NZQA approval to deliver plumbing and gasfitting unit standards. The ITO's role, as the accredited standard setting body, was to moderate the content and quality of the delivery of those unit standards by the ITP. Unitec accepts that in some cases an ITP may use delivery and assessment materials supplied by the ITO. The position is, however, the defendant says, that the ITO does not have a wider "programme" (in Education Act terms) that requires separate approval and accreditation and this was known full well by Mr Cruickshank.

[189] Mr Cook invited me to find that the ITO has only ever used the term "programme" in the generic sense of a "training package" or a "training system" but that it neither purports to provide, nor provides, a "full programme of study" as defined under the Education Act. Mr Cook submitted that ITOs are governed by the Industry Training Act 1992 and are charged with, among other responsibilities, developing and making arrangements for the delivery of industry training although they are prohibited from delivering training themselves.

[190] Next, Mr Cook turned to Mr Cruickshank's statement in his letters that the ITO uses the services of a private provider. Counsel submitted that this statement was misleading because it suggested that only one provider was used whereas, in fact, the ITO used seven providers nationally, only one of which was a private organisation. Mr Cruickshank's explanation was that his letters were sent to Auckland and Waikato based recipients and, at the time he wrote them, the only provider used in these areas was the private G & H Training provider. Counsel for Unitec submitted, however, that Mr Cruickshank was aware at the time that MIT was going to deliver the ITO's package in the near future.

[191] Third, Mr Cook took me to Mr Cruickshank's statement in his letters that student loans were not available through the ITO because the course was not ITO approved. Counsel conceded that although it is true that ITO students cannot get student loans to pay ITO fees, this is due to the type of government funding that the

ITO receives, and the fact that it is not a provider, rather than being a reflection on the quality of its course. Counsel submitted that as the ITO is not funded as a provider, it can never obtain course approvals and its apprentices will never be able to get student loans.

[192] Counsel submitted that the clear import of Mr Cruickshank's statement in his letters was that the ITO's programme could not be approved in the same manner as Unitec's but, in reality, it could never be approved as a "programme" (in the Education Act sense) because it received its funding from a source known as STM. Mr Cook submitted that by expressing himself in this manner, Mr Cruickshank was misleading employers and students to believe that the ITO programme did not fulfil all statutory requirements.

[193] Counsel invited the Court to conclude that Mr Cruickshank's failure to fully inform recipients of his letters, including of the reasons for the inability of ITO apprentices to get student loans, exhibited his intention to denigrate the ITO's training and to push students towards Unitec's programme.

[194] Turning to the letters in their totality, Mr Cook invited the Court to consider their contents by reference to their recipients, ATT host employers and students. They were said to be unlikely to be familiar with the complex legislative and historical background to the overlapping provision of training by ITPs and ITOs. Counsel submitted that in this context, Mr Cruickshank's over-simplified and one-sided statements in the letters were even more misleading. Mr Cook submitted that the tone of the letters was highly inappropriate. He said that the letters went beyond Mr Cruickshank's claimed intention for them that they were designed to inform people that Unitec was continuing to offer its own programme and that the recipients should make their own comparisons before deciding in which course to enrol.

[195] Mr Cook submitted that the letters implied clearly that the ITO's training package was inferior, substandard, and even unsafe. The only conclusion able to be reasonably drawn was that Mr Cruickshank wrote them with the deliberate intention of denigrating the ITO.

[196] The letters, although sent on Unitec letterhead and signed by Mr Cruickshank in his capacity as Head of Department, reflected his personal views, portraying the ITO as a competitor or even the enemy of Unitec when, in fact, both organisations had then recently committed to engage with each other on positive terms.

[197] In relation to the evidence of witnesses called by Mr Cruickshank who agreed with his statements in the letters, Mr Cook invited me to find that such witnesses did so out of steadfast loyalty to Mr Cruickshank rather than on any objective analysis, and that their evidence must be discounted when seen in that light.

[198] Counsel submitted that sending the letters was "improper conduct in a staff member's official capacity" and brought the standing of Mr Cruickshank's profession and/or Unitec into disrepute. The plaintiff's behaviour was unprofessional and contradicted Unitec's newly official position to collaborate with the ITO. Counsel submitted that Mr Cruickshank's actions nearly cost Unitec all hope of engaging with the ITO on good terms and may well have resulted in costly litigation had a retraction not been published immediately. Moreover, counsel submitted that the letters made Unitec appear as though it did not honour its business commitments and was prepared to spread false and misleading information to get ahead of the competition. These categorisations, together with what counsel submitted was Mr Cruickshank's self-evident unhealthy working relationship with the ITO, were the conclusions reached by Dr Fourie before deciding to dismiss him. Together, these failures were said to have completely dismantled Unitec's trust and confidence in the plaintiff so that his actions amounted to serious misconduct.

[199] Turning to the question whether the dismissal was an action that would have been taken by a fair and reasonable employer in all these circumstances of serious misconduct, Mr Cook invited the Court to find that Dr Fourie considered alternatives to dismissal in light of all the circumstances. These were said to have included:

- Mr Cruickshank's employment record;

- his length of service at Unitec;

- his support and respect from staff and industry;
- his industry expertise and contribution;
- the seniority of his position;
- Unitec's ongoing commitment to engage with the ITO;
- the nature of the misconduct and Mr Cruickshank's explanations ;
- its impact on the relationship of trust and confidence between the parties; and
- alternatives to dismissal including demotion and a final written warning.

[200] Unitec's conclusion was said to have been that Mr Cruickshank's long career, his expertise and his obvious care for his students and other staff, were outweighed by the seriousness of his misconduct and the loss of trust and confidence that had occurred. His actions were said to have been completely unprofessional, especially for a head of department, and had resulted in serious difficulties for Unitec that Mr Cruickshank does not even now appear to appreciate.

[201] In considering whether Mr Cruickshank could continue as a member of staff at Unitec, Dr Fourie was said to have examined whether he would be able to implement the ITO's delivery package and to work with the Co-Deans, Messrs Richardson and Nummy, and the ITO on a regular basis, even if he had been removed from his Head of Department position. Dr Fourie is said to have concluded, and Mr Cook submitted that the evidence establishes, that Mr Cruickshank had been so immersed in the issues with the ITO for so many years that his behaviour gave it no confidence that he could "let that baggage go". As Mr Cruickshank said in evidence, he still believes that "all the issues … including a level of quality and deliverability of the programmes … are current and not past issues."

[202] Mr Cook made the following legal submissions in response to Mr Campbell's reliance on the judgment of this Court in the *X* (*White)* case. Counsel distinguished the cases on their facts.

[203] The *X (White)* case was said to be distinguishable because the plaintiff's communications in that instance were not directed externally as were Mr Cruickshank's; Unitec's policies did not bind it, at least so closely, to non-punitive or rehabilitative outcomes; and there has been no allegation of disparate treatment by Unitec in this case. Further, Mr Cruickshank was said to have already received mentoring assistance from senior staff members to change his behaviour towards external stakeholders but it is clear that he was unlikely or even able to do so.

[204] Turning to Unitec's process that led to Mr Cruickshank's dismissal, Mr Cook submitted that this required, as a minimum, notice to Mr Cruickshank of the allegations against him and the likely consequences if they were established; a real opportunity to explain or refute those allegations; and an unbiased consideration of the explanation free from predetermination and uninfluenced by relevant considerations: *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd.*[18]

[205] Mr Cook reminded the Court, however, that Unitec's conduct of the disciplinary process was not in the words of *Unilever*:[19]

> … to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.

[206] Mr Cook submitted that Mr Cruickshank was notified of the allegations against him and of the likely consequences if they were established. That was in his letter of suspension of 16 July 2009. Further, Mr Cruickshank was said to have been given ample opportunity to respond to the allegations during two subsequent meetings and over the course of a detailed and lengthy exchange of written

[18] (1990) ERNZ Sel Cas 582 at 594-595.
[19] At 595.

correspondence between the parties. Mr Cook reminded me that Unitec postponed meetings and submission deadlines several times to accommodate Mr Cruickshank's wish to prepare his submissions.

[207] Mr Cook submitted that Mr Cruickshank's submissions were fully and objectively considered by an impartial investigator (Dr Fourie) from a faculty not associated with Mr Cruickshank. Dr Fourie was said to have been selected to provide objectivity and a degree of independence, had no historical relationship with the ITO, and had a reputation for being very thorough.

[208] Unitec denies the allegation of predetermination of its investigation and outcome. The retraction letter was sent to the ITO before any decision was made about Mr Cruickshank's future employment and served the discreet purpose of mitigating the damage caused by his letters. Dr Fourie was said not to have been influenced in his investigations by the retraction letter and, by his own account, would not have hesitated in finding that Mr Cruickshank had not committed serious misconduct if that was supported by the evidence, even if it had caused embarrassment to Dr Ede and Mr Richardson.

[209] Accepting that it is bound to follow its own policy and procedures, counsel for Unitec pointed to cl 5 of its disciplinary policy setting out different actions that Unitec "may" take when conducting an investigation but not that it "must" take.

[210] In accordance with cl 9 of Unitec's disciplinary policy, Dr Fourie was said to have informed Mr Cruickshank of the decision to dismiss him, and the effective date and the reasons for that decision, in his final conclusions of 28 September 2009. It is clear, Unitec submits, that Dr Fourie was the decision maker and Mr Cruickshank was aware of this. Dr Fourie is said to have had clear authority to dismiss and to have set this out both in his preliminary findings document and in his final findings document.

[211] As to the erroneous use of the word "recommendation" by Dr Fourie in his findings, Unitec accepts that this should have read "decision" but submits that the form of words used is largely irrelevant. Mr Wulff's letter simply confirmed Dr

Fourie's decision to dismiss and dealt with the administrative aspects of the termination. The reasons for the dismissal were said to have been included in Dr Fourie's findings document.

[212] As to the proper scope of Dr Fourie's investigation and Mr Cruickshank's allegation that it widened beyond what was set out in the suspension letter to include what he described as several "new charges", the defendant denies any impropriety.

[213] So, too, the defendant responds to Mr Cruickshank's objections to the questions that were asked of him at the 23 July 2009 meeting including that he was not given a copy of these beforehand and that only five out of the 48 intended questions related to the contents of the 16 July 2009 letter. Counsel submitted that all of Dr Fourie's investigations, including his 48 questions of 23 July 2009, were relevant to establishing whether, in sending the letters of 9 and 10 July 2009, Mr Cruickshank had committed serious misconduct. They were all relevant to the two types of misconduct investigated by Dr Fourie mentioned in the suspension letter, namely, improper conduct in a staff member's official capacity and/or conduct or behaviour that may bring the standing of his/her profession and/or Unitec into disrepute. The defendant says that Dr Fourie had typed out his questions primarily as a means of personal preparation for the meeting and to ensure "focus and structure". In any event, Mr Cook submitted, on 31 July 2009 Unitec provided copies of those questions to Mr Cruickshank following the 23 July 2009 meeting when requested to do so by the plaintiff. This gave Mr Cruickshank ample opportunity to advise Dr Fourie of any additional information.

[214] Additionally, the defendant says that any widening of its investigation was in direct response to, and following consideration of, issues raised by Mr Cruickshank in earlier aspects of the inquiry including, for example, his statement that he had Mr Richardson's permission to send the letters and that not sending them would have been an abrogation of his duty. Therefore, the defendant says, Dr Fourie's investigations were not unfairly broadened to include "new charges" and this is clearly set out in his 8 September 2009 letter to Mr Cruickshank.

[215] In any event, the defendant says, on 8 September 2009 Dr Fourie invited Mr Cruickshank to another meeting in which he could make further submissions if he regarded any charges as "new", so that these allegations were put squarely to the plaintiff. In the end, it is significant Mr Cook submitted, that Mr Cruickshank did not wish to avail himself of that opportunity for another meeting.

[216] As to Mr Cruickshank's objections to Dr Fourie's failure to interview three persons (Linda Hunt, Nick Fleckney and a representative of MIT), Mr Cook submitted that it was not necessary for it to do so to determine whether Mr Cruickshank should be dismissed. Counsel said that Drs Ede and Fourie were already aware that Mr Cruickshank had the support of his staff and that the matters to which these people would attest were not within the scope of Dr Fourie's investigations.

Decision - dismissal

[217] I deal first and briefly with Mr Campbell's submission, as I understood it, that Mr Cruickshank's summary dismissal infringed his academic freedom to criticise his employer on a matter of valid educational interest and debate. It is, perhaps fortunately, unnecessary to decide this issue because to do so would require detailed exploration of the rights and obligations of employed academic staff and their employing institutions, which has not been addressed, at least in the necessary detail, by counsel's submissions.

[218] Mr Campbell may well be correct that as a matter of principle, an academic staff member of a tertiary institution is entitled to criticise publicly the academic direction that the institution has resolved to take on a point of valid academic controversy. That may be so especially where the academic employee is qualified and entitled to hold and express views that may be contrary to those of other academics in the management of the institution. It is likely, however, that there will be limits on the way in which such criticisms can be expressed, albeit strongly and critically. I imagine that the expression of such views would need to be made clearly as those of the individual academic and not portrayed as the views of the institution. In any event, this is not the case to decide this interesting and, in New Zealand

employment law at least, novel question. The case can and will be determined by the application of applicable statutory and employment case law.

[219] This has not been an easy decision to make. What Mr Cruickshank did for which he was dismissed, was a bold and risky challenge to what he sincerely believed was Unitec's unacceptable lowering of standards in the training and, therefore, qualification of plumbing and gasfitting apprentices. It put him in conflict with Unitec for which he could only reasonably have expected a critical investigation and, potentially, some censure. The statutory test for determining whether the ultimate expression of that censure, summary dismissal of Mr Cruickshank, was justified, is the then applicable test under s 103A of the Act.

[220] Were summary dismissal of Mr Cruickshank, and the way Unitec went about deciding to do so, what and how a fair and reasonable employer would have done in all the circumstances at the time?

[221] Dealing first with the 'how' or process element of the test, not all of the plaintiff's many criticisms succeed. Unitec assigned the task of investigation and decision making to a senior manager with some previous experience of such tasks but who was not acquainted with Mr Cruickshank. That dean, Dr Fourie, took advice from Unitec's Human Resources Manager, conducted a series of meetings with Mr Cruickshank and his representative, considered extensive written submissions from Mr Cruickshank, and re-scheduled significant events in that process to meet the plaintiff's requests for more time to respond. I do not consider that the range of that investigation was unfair or unnecessary.

[222] Although Dr Fourie may have used the language of recommendation rather than decision making in his correspondence with Mr Cruickshank, that was an error without consequence. It was Dr Fourie who made the decision to dismiss Mr Cruickshank although this was approved by Unitec's Chief Executive, Dr Ede, who was the plaintiff's employer. Ultimately, it is the Chief Executive who must take responsibility for the justification of his dismissal of Mr Cruickshank and the defendant has done so.

[223] I would not go so far as Mr Cruickshank claimed, to find that Unitec's retraction letter sent to the ITO in late July 2009 meant necessarily that his summary dismissal was predetermined by the defendant. I have been critical of it in the way in which it responded immediately to the ITO and find that its investigation was affected significantly by the ITO's aggressive letter and Unitec's overwhelming desire to preserve a good relationship with the ITO. However, that alone does not establish predetermination on the employer's part and, therefore, unjustified dismissal.

[224] Unitec's retraction and apology letter to the ITO accepting, for the most part, that Mr Cruickshank's assertions in his letters of 9 and 10 July 2009 were wrong, did not amount to a predetermination of those issues. However, its immediacy and acceptance of blame meant that Unitec put itself in a very difficult position to subsequently conclude, fairly and objectively, that the plaintiff may have been correct. It was obliged to make such a decision as part of its investigation of the allegations against Mr Cruickshank with an open mind and following a full and fair inquiry. I consider that Mr Campbell's description of the sending of the revocation and apology letter to the ITO as irrecoverably tainting the investigation goes too far. However, in Unitec's subsequent inquiry, it nevertheless committed itself to a preliminary and, as it transpired, erroneous conclusion about the contents of Mr Cruickshank's letters. Seen in this way, Unitec's haste in responding to the ITO and its wish to assuage the ITO's anger very promptly, compromised its statutory and contractual obligations under employment law to Mr Cruickshank.

[225] I accept, also, that Mr Richardson's stated wish to have his department's budget cover the cost of advertising to replace Mr Cruickshank as head of department before Unitec's investigative process had been concluded, is a further unfairness and indication of the absence of an open-minded consideration by Unitec of Mr Cruickshank's case. On its own it may appear minor, but as part of an overall assessment of a fair and open-minded employer, it contributes to the defendant's failure to meet the s 103A test.

[226] I do not accept Mr Campbell's proposition that, as a matter of fairness, the plaintiff should have been given the list of 48 questions (intended to be asked of him

at the meeting of 23 July 2009) before that meeting and that Unitec's failure to do so renders the dismissal unjustified. However, the extensive nature of their subject matter and the absence of prior advice about the fact that those subjects would be raised at the meeting, adds to the overall assessment of procedural unfairness to Mr Cruickshank in Unitec's investigative tactics.

[227] So, too, was Dr Fourie's refusal to interview other Unitec employees with whom he was asked by Mr Cruickshank to speak. Such of those other employees who gave evidence before the Court about matters relevant to Mr Cruickshank's situation could have done so to Dr Fourie. His refusal to accede to what were reasonable requests to obtain relevant information was unfair to the plaintiff. It is another element that adds to an overall assessment of unfairness.

[228] In particular, Unitec's decision not to make inquiries of a relevant and material witness to an important telephone conversation between Messrs Cruickshank and Richardson, is also not what a fair and reasonable employer would have done in all the circumstances. There is little doubt, on the evidence heard by the Court, that Ms Williams did hear Mr Cruickshank's side of the conversation that he had with Mr Richardson. Although, of course, not hearing Mr Richardson, Ms Williams's evidence about what Mr Cruickshank said was a potentially important piece of evidence about what Mr Richardson knew or did not know of Mr Cruickshank's intention to send out the letters he did on 9 and 10 July 2009. If Dr Fourie had heard and considered that evidence, it should have weighed significantly in Mr Cruickshank's favour in the investigation and decision making process. By failing or refusing to take account of that significant evidence, Unitec deprived the plaintiff of a full and fair consideration of his defence to the allegations against him.

[229] While on its own, each of the failings I have identified might not amount to procedural unfairness which would make a dismissal unjustified, together and in combination I find that how the employer went about making the decision to dismiss the plaintiff was not substantially fair or reasonable. As is also not uncommon, I find that the defendant's procedural failings affected significantly the substantive decision it had to make.

[230] I am also not satisfied that Mr Cruickshank's summary dismissal was the outcome that a fair and reasonable employer would have determined. That is for the following reasons.

[231] The source of the allegations of serious misconduct against Mr Cruickshank was the ITO's complaint in its solicitors' letter of 16 July 2009 that Mr Cruickshank's assertions in his letters to apprentices and employers were wrong and prejudicial to the ITO. As Mr Cruickshank asserted at the time, and as the evidence put before the Court establishes, each of those claims of inaccuracy has itself been shown to be wrong. That has weakened significantly the employer's case against Mr Cruickshank. If, as a fair and reasonable employer investigating these serious allegations fully and fairly, Unitec had reached that conclusion, it would not have had grounds without more to dismiss Mr Cruickshank summarily as it did.

[232] Faced with the evidence of their inaccuracy, Unitec's case against Mr Cruickshank changed in material respects from being one of the provision to apprentices and employers of "incorrect" information, to one that those letters contained technically correct but misleading information. In doing so, Unitec was driven to argue that Mr Cruickshank's letters contained implicit messages for the recipients in the nature of half-truths. Although that was not the ITO's allegation which led to Mr Cruickshank's suspension and Unitec's investigation which resulted in his dismissal, it is necessary to address this altered categorisation of his letters.

[233] The ITO's first allegation was that Mr Cruickshank stated incorrectly that the ITO's National Certificate was not approved by NZQA. This was said to have been intended to demean the ITO's National Certificate when compared to the quality of Unitec's programme which was approved by NZQA. The ITO's complaint was that its programmes could not be subjected to the same academic standards as Unitec's and that Mr Cruickshank's letter was misleading in not saying so.

[234] I have concluded, and find Unitec should reasonably have done likewise, that Mr Cruickshank's statement was not inaccurate and that it cannot be read impliedly that the ITO's National Certificate would not have met NZQA's standards as Unitec's did. The point, express and implicit, of this aspect of Mr Cruickshank's letters was

that Unitec's apprenticeship programme met NZQA standards whereas the ITO's did not. Mr Cruickshank's point was that apprentices and employers should consider carefully which programme they would remain with or might enrol in.

[235] The second ITO complaint related to Mr Cruickshank's statement in his letters about the availability of student loans for Unitec's programme and the unavailability of these loans for the ITO's. The implication of these statements was said by Unitec to have been that the unavailability of loans for the ITO's courses related to the fact that they were unapproved.

[236] Again, Mr Cruickshank's statement was correct and it is unreasonable to imply into it that student loans were unavailable for ITO courses because of their unapproved nature. It was, as Mr Cruickshank said, of interest to apprentices (and their employers) whether they might be able to be assisted in pursuing their courses of study by student loans. The technical reasons for the unavailability of student loans for the ITO courses would not have mattered much if at all to them. The differences between the two programmes, and their availability for student loans, was a potentially important element for the recipient of the letters and Mr Cruickshank's advice was not incorrect. Nor, as Unitec concluded, was it technically correct but misleading.

[237] Turning to the third feature of the letters of 9 and 10 July 2009, this was said to be the inaccurate implication of Mr Cruickshank's letter that the only alternative provider of courses in Auckland (through the ITO) was a private training provider. The implication was said to have been one of inferiority when compared to Unitec as a publicly funded and longstanding provider of plumbing and gasfitting apprenticeship courses. Again I conclude that Mr Cruickshank's statement was not inaccurate. At the time, the ITO's only alternative to Unitec was the private provider known as G & H Training which had not had a long background in plumbing and gasfitting training although it had been involved in other spheres of trade training. Although MIT had previously undertaken some plumbing and gasfitting courses and was in discussion with the ITO about doing so again in future, Mr Cruickshank was correct that at the time there was no other public institution provider than Unitec.

[238] Again, I do not accept that it was a reasonable inference from Mr Cruickshank's letters that the private provider was inferior to Unitec. Whether apprentices and their employers chose to subscribe to or continue with a programme at a large, long-established and publicly funded institution, was an important question for those persons and one raised by Mr Cruickshank in a factual way, whether expressly or implicitly.

[239] Finally, the ITO complained about the alleged falsity of Mr Cruickshank's advice in his letters that Unitec was able to provide training to apprentices from throughout New Zealand. The evidence heard by me established that this was a correct statement by Mr Cruickshank and the ITO's assertion of its inaccuracy was itself wrong. It is noteworthy that Unitec did not seek to contend otherwise than Mr Cruickshank had stated in his letters. That fourth assertion by the ITO did not ever feature in Unitec's conclusions that led to the plaintiff's dismissal. It is, however, significant in determining justification for Mr Cruickshank dismissal in all the circumstances, that this clearly incorrect allegation was made but not refuted by Unitec either in its response to the ITO or in its investigation of the ITO's allegations against Mr Cruickshank.

[240] That the plaintiff has established by evidence that Unitec ought to have reached these conclusions as a fair and reasonable employer would have. This alone does not mean that his dismissal must have been unjustified. The propriety of his corresponding on Unitec letterhead with apprentices and employers, as he did, even if accurately and not misleadingly, remains an issue affecting the justification for what the defendant did. Mr Cruickshank should not have conveyed his views as Unitec's. However, that does not alter significantly the seriousness of the plaintiff's actions which was the basis of the defendant's decision to dismiss Mr Cruickshank summarily.

[241] Next I deal with the conclusion by Unitec that Mr Cruickshank's actions in writing the letters of 9 and 10 July 2009 brought it into disrepute. So far as the defendant itself is concerned, the letters and their contents can really only have had this consequence with the ITO. That is because the tone and content of the letters were avowedly pro-Unitec. Rather than these bringing the institution into disrepute,

they purported to enhance its reputation for quality trades education and qualification. If the letters had, either expressly or by reasonable implication, attacked the ITO in an unreasonable way, I accept that they may thereby have brought Unitec into disrepute in the sense that it ought not to have so attacked another educational institution in that manner. But, as I have already found, Mr Cruickshank's letters were expressed in a way that did not do so either expressly or, by reasonable implication. They invited their readers to compare carefully the relevant benefits and disadvantages of the two sorts of programmes and highlighted deliberately Unitec's advantages. There could have been no reasonable requirement on Mr Cruickshank, however, to have presented an entirely fair and balanced comparison in his promotion of Unitec and its programme. To use the example of student loan availability, it would not have been reasonable to have required Mr Cruickshank to have set out the technical reasons why student loans could not be provided for ITO study courses.

[242] To any extent that Unitec may have been brought into disrepute in the eyes of the ITO, this was addressed promptly by Unitec's response to the ITO's solicitors' letter of 16 July 2009 and negatived by Unitec's subsequent dealings with the ITO. Any disrepute was confined to the ITO and of limited duration. There was no evidence tendered of Unitec being brought into disrepute in the eyes of others and, indeed, much of the evidence led to support Mr Cruickshank's position tended to the opposite effect.

[243] Although Mr Cruickshank was unwise to have both written as he did to apprentices and employers, his motive was not to undermine the relationship between Unitec and the ITO but was essentially to attempt to highlight Unitec's high standards of training for, and qualification of, plumbers and gasfitters. Mr Cruickshank believed genuinely that these standards were at risk if the ITO was to assume responsibility for this in the Auckland region. Insufficient account was taken by Unitec of the plaintiff's motivation in the sense that it concluded that this was wholly or predominantly to undermine the ITO rather than, as I have concluded, having significant elements of Unitec support and a commitment to high quality training of apprentices.

[244] I am also satisfied that, despite its assertions in evidence that it did so, Unitec failed to consider, or at least did not take into account sufficiently, relevant background and extenuating factors in its decision to dismiss Mr Cruickshank summarily. Had it done so, I consider it probable that these would have been recorded by it in the same meticulous and detailed way that other factors were. These considerations not taken into account by Unitec included Mr Cruickshank's long and successful teaching career, the significant level of support for his position amongst other staff at Unitec, and his support from the trades. Nor, too, was sufficient attention paid by Unitec to the consequences to Mr Cruickshank's academic career of summary dismissal.

[245] If these elements had been taken into account properly as required by Unitec's own policies, I am satisfied that a fair and reasonable employer would not have dismissed Mr Cruickshank summarily for serious misconduct as it did. Rather, it would have investigated and considered other ways of ensuring that its relevant strategic direction could be maintained in conjunction with his employment.

[246] I have already referred to the defendant's failure to consider Ms Williams's evidence about the phone conversation of 7 July 2009. Given the absence of clarity and independent corroboration of what transpired between Messrs Cruickshank and Richardson at their critical meeting on 8 July 2009 about whether or not Mr Cruickshank's letters could or should be sent out, a fair and reasonable employer would have given Mr Cruickshank the benefit of the doubt. Unitec would not have dismissed him summarily by accepting uncritically Mr Richardson's subsequent account of these events and rejecting the plaintiff's.

[247] The failure by Unitec to inform Mr Cruickshank of Mr Richardson's decision that the proposed joint MIT/Unitec letter to the ITPQ was not to be sent, was a significant and largely unexplained omission by the defendant. It is material to the question of Mr Cruickshank's culpability in sending out the letters that he did. Inconsistently with an otherwise commendable pattern of keeping Mr Cruickshank informed of such developments, Unitec's failure to do so in this respect led the plaintiff to assume that the joint letter had been sent and, thereby, to believe that his letters to apprentices and employers to be sent shortly afterwards would be

consistent with what he understood would be the content of that letter to the ITPQ. Had Mr Cruickshank been made aware that Mr Richardson had stopped the sending of the letter, as indeed MIT was advised, I accept that he may well not have sent the 9 and 10 July 2009 letters to apprentices and employers. At least he would have established more soundly with Mr Richardson his entitlement to do so. Unitec's failure in this regard was a material non-compliance with its obligations to the plaintiff including under s 4(1A) of the Act.

[248] Together, the foregoing mean that a fair and reasonable employer in Unitec's circumstances at the time, would not have dismissed Mr Cruickshank summarily but would have imposed lesser sanctions on his actions, to which it was entitled to object. In these circumstances, I have concluded that Mr Cruickshank was dismissed unjustifiably.

Remedies

[249] As already noted, Mr Cruickshank's primary claim to reinstatement must now be reconsidered in light of further evidence put before the Court since the hearing.

[250] It is clear also that, although his summary dismissal was unjustified, Mr Cruickshank's conduct contributed to the circumstances which gave rise to his dismissal in a way that will need to be reflected under s 124 of the Act in the remedies to be granted.

[251] Irrespective of those further considerations, it is also clear that Mr Cruickshank has lost remuneration as a result of his unjustified dismissal. Pursuant to s 128 of the Act, on the evidence heard already, that actual remuneration loss exceeds three months' ordinary time remuneration. So, pursuant to s 128(2), Mr Cruickshank will be entitled to at least three months' ordinary time remuneration, being the lesser of those sums. I have concluded that any final reduction to remedies under s 124 will not affect that minimum entitlement to three months' ordinary time remuneration. At the date of his dismissal, Mr Cruickshank's annual salary was $100,000. As an interim remedy for unjustified dismissal, therefore, the defendant must pay Mr Cruickshank the sum of $25,000, being three months' ordinary time

remuneration. Further lost remuneration will be assessed as part of the resumed hearing on remedies.

[252] In respect of Mr Cruickshank's unjustified disadvantage grievance (his suspension), this was on pay so there is no question of remuneration loss. Nor will there be any question of a s 124 reduction for s 123(1)(c)(i) compensation for Mr Cruickshank's unjustified suspension, because he could not have contributed, and did not contribute, to that breach by his employer. The Authority awarded Mr Cruickshank compensation of $1,000 for this breach but I regard that as insufficient to compensate for the consequences of a sudden, prolonged, very public and clearly flawed suspension. To the extent that a monetary award can compensate adequately for the serious consequences of this, I allow Mr Cruickshank compensation for his unlawful suspension pursuant to s 123(1)(c)(i) of the Act in the sum of $8,000. This, too, will not be affected by the further remedies hearing and so should be paid now by the defendant to the plaintiff.

[253] The Registrar should arrange a telephone conference call with counsel for the parties to determine how and when the remaining remedies and costs' issues can be dealt with.

GL Colgan
Chief Judge

Judgment signed at 5.15 pm on Friday 30 November 2012

ANNEXURE 1

As you may be aware, for many years now there have been two programmes offered in New Zealand for apprentices to obtain a National Certificate in the above subjects. The Education Act 1989 (under which Unitec operates) charges Polytechs with a number of obligations and functions, including the following:

- At the request of industry, to design and have approved programmes for the attainment of National Qualifications.
- To deliver programmes for Vocational (trade) training and education, leading to an enhancement of skills and increasing the achievement of advanced trade, technical and professional qualifications to meet regional and industry needs.

Due to this Government requirement, and following the registration of new National Certificates in 2008, Unitec analysed the requirements of the new qualifications and developed a programme to deliver the qualifications. As the new prescriptions had a considerable increase in both size and scope, with new requirements regarding both underpinning theory and additional practical skills, a programme was designed to allow for apprentices to gain all the required skills and knowledge over a four year programme. This programme was subjected to a vigorous moderation process before gaining final approval through the NZQA approval process, and started running for all new apprentices this year.

This programme is very comprehensive, and designed to cover all aspects of the two National Certificates in Plumbing and Gasfitting, and in particular takes account of the fact that the vast majority of employers only cover a small sector of the industry, requiring substantial training in those other areas.

The programme … is a full four year apprenticeship (8.000 hours) [which] consists of three 2 week block courses a year (2 training, one assessment) for three years and a final year of two 2 week block courses, for final assessments. Apprentices are also required to complete a distance learning package available over the Web through the Unitec E-book.

You may also be aware that when the more comprehensive and larger National Certificates were introduced, the Industry Training Organisation (ITO) introduced a training programme with greatly ***reduced*** off site training, with a total of only 11 weeks of block courses. This programme has not been subjected to the approval process required for delivery under NZQA guidelines.

Following a detailed analysis of this proposal, Unitec has expressed considerable concern at the time allowances for training and assessment, and with the format and type of delivery of this proposed programme. These concerns have not been adequately addressed as yet.

It has recently been announced that the Apprenticeship Training Trust is to enrol its employees (apprentices) with the ITO from this September, and would be using the 11 week training model mentioned above, from that date.

This letter is to advise you as an employer or potential employer of apprentices, that an alternative training programme (the Unitec programme) is available as an alternative to the ITO programme, and is open to all trainees and apprentices in New Zealand. We would ask you, before deciding which model to adopt, to ensure you have all the facts and have made a proper and detailed comparison of the two systems, before committing to either one.

You may also wish to consider where the training may take place, with the ITO choosing to utilise the services of a Private Provider which up until now has run mainly low level carpentry courses and has no experience in the Plumbing or Gasfitting industries.

In our experience, most employers in the Plumbing and Gasfitting industry are very concerned at attempts made from time to time to "dumb down" the industry, with a further recent proposal from the Registration Board to introduce a new 2 year apprenticeship and level 3 (low level) National Certificate in Plumbing and Gasfitting. This qualification does not exist as yet, and there is considerable concern as to the possible ramifications of reducing the training yet further.

Please be assured that the primary and only concern behind the Unitec programme is that the end result of the apprenticeship is a fully rounded and skilled tradesperson, with Unitec not receiving <u>any extra funding</u> for the additional time (we would get the same whether our programme was 22 weeks or 11 weeks). This programme is in fact costing us considerably m ore to operate than the alternative, but we have made a conscious decision to do this because we believe the outcome is more important than the cost.

We do understand the Unitec programme also has a greater cost to you as an employer (in terms of apprentice time away at block course) but hope that you also take into account the long term advantages of a properly training tradesperson, and the long term costs if that does not happen.

As the Unitec programme is fully approved and registered with the NZQA and Tertiary Education Commission, students are able to obtain an interest free student loan to cover their course costs, which are currently $1290 per year, plus costs of $1.55 per credit for NZQA registration.

Current fees for the ITO course are $2,000 per year, but as their programme is not approved under NZQA guidelines, student loans are not available.

To enrol an apprentice directly with Unitec, simply contact **Avril** or **Saskia** on **0800 TO THE TOP**.

If you require any further information, or wish to discuss this matter in detail, please phone me at Unitec on **09-815 4321 ext 8812** or on **021 911 401** or email me <u>gcruickshank @unitec.ac.nz</u>.

…

ANNEXURE 2

As you will be aware by now, it has just been announced by your employer, the Apprenticeship Training Trust, that they have entered into an agreement with the Plumbing, Gasfitting, Drainlaying & Roofing Industry Training Organisation (the ITO) to enrol all their apprentices with that organisation from 01 September this year. This is to start with new intakes and be extended to existing apprentices as each group ends a particular stage.

This will involve you undertaking the ITO programme, using ITO learning materials and assessments, and attending a provider chosen by the ITO.

This letter is to advise you of an option regarding your future training, which you may wish to consider. This is a very important decision which should not be taken lightly and we would ask you to discuss with your host employer and family members the various options available.

1. **The Unitec programme** is fully moderated and approved through the NZQA accreditation and approval system. This means that students can apply for interest free student loans to cover course fees. The ITO programme does not meet this criteria and students must self-fund that programme. The current cost of each year of ITO programme is $2,000.

2. The ITO programme has fewer block courses than the Unitec programme with different levels of skill assessment and different expectations of theory knowledge required. It is generally accepted that the ITO system is much easier to pass, which raises a number of questions. We would ask you to consider whether an easy pass is as important in the long term as obtaining a good level of skill and knowledge.

3. While no organisation is perfect or should claim to be so, experience in delivery and quality of delivery material needs to be considered. You should consider where you will be asked to **attend block courses in future as there are limited options.** Some of those involve organisations with no history of delivering plumbing or gasfitting programmes, lack of resources, lack of skilled and experienced staff and lack of delivery materials. The capacity of some providers to offer block courses is also very limited which may lead to considerable delays in attendance.

4. The history of reliability should be looked at. Since Unitec commenced with its own programmes in 2000, **not a single block course has been cancelled**, even when numbers have fallen to uneconomic levels. This is an act of faith from Unitec as we fully understand the complex arrangements which have to be made when apprentices attend block courses, so we make that planning as predictable as possible. You may wish to ask apprentices who have experienced the reliability of ITO block course delivery – and sometimes extended periods between blocks – to obtain information regarding that.

5. Although we have an enviable record regarding the predictability of block courses, we have retained a flexibility to enable students to swap between courses. In the event [that] unforseen circumstances mean they miss out on a particular course the students are then able to rejoin their original group. Many apprentices including you have probably experienced this.

6. The quality of learning material which you are now experiencing through the E-book and earlier modules needs to be compared with the alternative, much of which has not yet even been written. We strongly urge you to demand to **see examples of what is available and will be used under this new regime**. We think you will be quite surprised.

As you are currently employed by a **host employer we would suggest you discuss with them the contents of this letter**, and if either of you have any questions or wish to discuss this matter in detail, please phone me at Unitec on **09-815 4321 ext 8812** or on **021 911 401** or email me gcruickshank @unitec.ac.nz.

As you are already enrolled with Unitec you do not need to do anything at this point. However, if your host employer wishes to consider enrolling employees directly with Unitec in the future they should contact us as soon as possible to discuss this option which is quite simple and involves a minimum of paperwork. Contact **Avril** or **Saskia** on **0800 TO THE TOP**.

ANNEXURE 3

PLUMBING AND GASFITTING – LETTER TO APPRENTICESHIP TRAINING TRUST EMPLOYERS AND TRAINEES

1 We act for the Plumbing Gasfitting and Drainlaying Industry Training Organisation (**PGD ITO**).

2 Attached are two recent letters from Unitec which have been provided to our client by industry members. We understand the first has been sent to all industry hosts of Apprenticeship Training Trust (**ATT**) apprentices and the second to all ATT apprentices.

3 Our client is extremely concerned and very disappointed with Unitec's actions in sending these letters. The letters contain false factual statements and are highly misleading in a number of material respects. In addition, these letters will serve only to confuse industry members and worsen the divide between these training systems.

4 The false and misleading statements in these letters are defamatory of our client and unless corrected have potential to cause significant economic loss for which our client will hold Unitec liable. The following matters contain the most obviously false and misleading statements (although this is by no means an exhaustive list):

4.1 The categorical statement in the letter to employers and the implication in the letter to trainees, that the PGD ITO's National Certificate is not approved by NZQA is false;

4.2 The implication in both letters that student loans are not available to apprentices enrolled in ITO administered apprenticeships due to these not being NZQA approved is again false. As you are well aware, the PGD ITO's courses are NZQA approved and the only reason that Unitec apprentices are able to access student loans is that their apprenticeship training is being funded through the EFTS system rather than via the Industry Training Fund;

4.3 The implication in the letter to employers that the only provider contracted to deliver training to ITO apprentices is a Private Training Establishment (**PTE**) is again false. In fact, the PGD ITO has seven providers contracted throughout New Zealand to deliver training to PGD ITO apprentices. Only one of these is a PTE. In Auckland provision is also available at Manukau Institute of Technology;

4.4 The letter to the employers also falsely states that Unitec is able to provide alternative training to all apprentices and trainees in New Zealand. This is clearly directly contrary to the TEC prohibition on out of region activity, and the TEC will no doubt be concerned by this statement.

5 Each of these statements is not only false but is calculated to mislead employers and apprentices. Given the seriousness of this matter, our client seeks:

5.1 a list of all persons and/or organisations to whom the attached letters (or any similar communication of which our client has not yet become aware) have been sent; and

5.2 your immediate undertaking that a retraction letter, in terms suitable to our client, will be sent to all those who received a copy of these letters or any similar communication. Please confirm your undertaking to do this as a matter of urgency.

6 Depending on how quickly this retraction is issued consideration will then need to be given to how much damage the publication of these false and misleading letters has caused.

7 On 7 July 2009, only two days prior to the date of the first letter, our client, together with ATT, met with you as Unitec's Chief Executive and was given verbal assurances that a further meeting would be held to consider the possibility of the PGD ITO contracting Unitec to deliver training as part of the ITO group of providers. Despite representing to our client that Unitec would work with the PGD ITO to try and find cooperative ways of moving forward, these letters demonstrate that instead Unitec intends to attempt to mislead and divide the industry in a manner that is both counterproductive and damaging for all parties. The distribution of these letters, a mere two to three days after these assurances were given, makes it clear the assurances were, at best, hollow.

8 In light of what was discussed at the meeting on 7 July between yourself and our client's Chief Executive, it seems to us possible that you may not be aware of these letters signed out by your Head of Department for Plumbing and Gasfitting. If you were not aware of these letters then, depending on the speed and nature of your response to this letter, our client considers it may still be possible to engage with you in genuine discussions over the opportunity to work cooperatively with Unitec.

9 In the absence of confirmation that you were not aware of these letters and a full retraction to the persons to whom they were sent, our client not only sees there being little or no prospect of Unitec joining the national network of PGD ITO providers, but sees it as inevitable that legal action will be necessary to redress the false and misleading statements made in these letters.

10 We look forward to hearing from you as a matter of urgency.