

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 74 - application for reinstatement

Debra Hancock AND Djarragun College (TD/2008/148)

COMMISSIONER FISHER

7 May 2010

Application for Reinstatement - Dismissal - Performance - Commitment to extra-curricular activities - Evidence - Performance appraisal - Concerns student management and class control - Planning, curriculum delivery and assessment - Failure to produce unit plan - Failure to achieve educational outcomes for students - Inability to deliver learning programs - Dismissal not unfair - Application refused.

DECISION

- [1] Debra Hancock commenced employment as an English/Art Teacher with Djarragun College in January 2007, was made permanent on 1 January 2008 and was dismissed on 25 August 2008 with six weeks' notice. Ms Hancock was advised that her dismissal was due to "ineffectual and mediocre" performance.
- [2] The Principal of the College, Jean Illingworth, and the other senior leaders of Djarragun College who gave evidence, spoke in glowing terms of Ms Hancock's commitment to the extra-curricular activities of the College. As a consequence of this commitment Ms Illingworth said that the College had attempted to find an appropriate teaching role for Ms Hancock but after trying her in a couple of positions without success the College had no option but to terminate her employment.
- [3] It is Ms Hancock's contention that she was not qualified for the teaching positions she was given and further was not given proper warning as to her performance or the opportunity to properly respond to allegations about her performance. Accordingly, Ms Hancock submitted that her dismissal was harsh, unjust or unreasonable.
- [4] Djarragun College specialises in Aboriginal and Torres Strait Islander education. The College is organised into a primary school (Preparatory Year - Year 7), middle school (Years 8-10) and senior school (Years 11 and 12). The College also offers vocational education programs and a Year 13.
- [5] Ms Hancock has been a teacher since 1983. In her Witness Statement Ms Hancock outlined her teaching experience. Ms Hancock commenced teaching in 1983 as an English/Maths teacher in New South Wales. She had a break from teaching in 1985 and part of 1986 but returned to the profession as an Art teacher in 1986. Ms Hancock continued teaching, although it seems not always in a permanent or continuous capacity, in various schools in Victoria and Queensland. From 1990 to 1999 Ms Hancock ran the Art Department at the Wangetti Education Centre. From 1999 until 2004 Ms Hancock worked as a relief teacher, taught English in Japan in 2004-5 and then returned to teaching in Queensland in 2006. From that time Ms Hancock taught English part-time at a State High School, worked as a relief teacher and taught English at a College of English until her appointment at Djarragun College in 2007.
- [6] When Ms Hancock commenced employment at Djarragun College she had responsibilities for teaching Year 12B English and certain Art classes. At that time Vimal Shankaran was the Head of Senior Secondary at the College. (He is now the Assistant Principal of Student Support Services). As Head of Senior Secondary Mr Shankaran was responsible for the performance of teachers in the Senior Secondary school, including Ms Hancock.
- [7] In March 2007 he conducted a performance appraisal of Ms Hancock. Mr Shankaran's appraisal was not positive. He found her to be "Not yet competent" in 11 performance areas and "Incompetent" in two. He specified the main concerns being student management and class control. Student numbers in Ms Hancock's Year 12B English class had dropped from 15 to 9. Mr Shankaran also identified concerns with planning, curriculum delivery and assessment. In particular he said she had failed to produce a unit plan for Year 12B English.
- [8] As part of the appraisal various strategies were put in place to assist Ms Hancock to become a "highly competent" teacher. In addition Mr Shankaran provided Ms Hancock with an action plan and other strategies to ensure her success.

- [9] One of the strategies put in place was for Ms Hancock to be paired with another teacher, who was a core teacher in English, in order to provide peer support.
- [10] Ms Hancock was subsequently allocated to teach English and Art to the Senior Vocational Group comprised mostly of Year 10 but with some Year 11 students who had very low levels of literacy and numeracy. To assist Ms Hancock in that class Ms Illingworth modelled teaching practice. Three learning support workers and another teacher, when that teacher had free time, were also provided to assist Ms Hancock. Ms Hancock was the designated teacher in charge of the class.
- [11] According to the College none of the strategies worked. Despite the College's concerns about Ms Hancock's teaching performance no other performance appraisals or other formal feedback sessions were conducted in 2007 and no warnings were given. More informal interactions occurred, however, between Mr Shankaran and Ms Hancock after the appraisal meeting. Mr Shankaran said he met with Ms Hancock a further four times over the course of 2007 particularly in relation to planning for her English courses and behaviour management.
- [12] Ms Illingworth said Ms Hancock was asked to produce a learning program for the Senior Vocational Group but she failed to do so. Ms Illingworth also informed the Commission that Ms Hancock had failed to assess the Year 12B students' work and there were no portfolios of students' work for the College to put forward for assessment or moderation. As a result all of the students in Ms Hancock's class were awarded a low achievement in English communication.
- [13] Despite this significant oversight, by letter dated 4 December 2007 Ms Illingworth proceeded to appoint Ms Hancock as a permanent teacher at Djarragun College commencing 1 January 2008. Although Ms Illingworth did not concede making a mistake in offering Ms Hancock permanent employment she believed that Mr Shankaran had not thoroughly investigated the level of her performance. Mr Shankaran had persuaded Ms Illingworth that by his working with Ms Hancock and with the provision of professional development, Ms Hancock could reach acceptable teaching standards.
- [14] Ms Illingworth said that in light of Ms Hancock's failure to achieve educational outcomes for students but because the College was conscious of the extra curricular activities she performed, the College wanted to do as much as it could to help her become an effective teacher. To that end Ms Illingworth decided to move Ms Hancock into the VET area.
- [15] In the beginning of 2008 Ms Hancock was teaching in both the senior secondary school and the VET area. From the start of Semester 2, 2008 Ms Hancock worked exclusively in the VET area.
- [16] Ms Hancock was given teaching responsibilities in the VET area because Ms Illingworth had been advised by the previous principal of Wangetti who was then at Djarragun College that Ms Hancock had qualifications in woodworking and had taught woodworking at Wangetti. Ms Illingworth believed this would be an area in which Ms Hancock would excel. In his evidence Mr Cotton recalled a conversation with Ms Hancock where she had indicated her industry experience in furnishings and furniture she had produced commercially. Because of this she was redirected into the furnishings course.
- [17] Although Ms Hancock was never specifically asked whether she had qualifications in woodworking she did not refuse to teach the class. (The evidence suggests that the course was initially referred to as woodworking but was in fact a Certificate 1 in Furnishings). Ms Illingworth said that Ms Hancock was provided with support from a VET tutor (a qualified tradesperson) who was working in the next room with the door open. Ms Hancock denied that she was told this VET tutor was there to provide assistance to her.
- [18] Mr Cotton, who was employed at the relevant time as the Deputy Principal of the College and was responsible for the VET programs, said that he asked Ms Hancock to prepare a program which would detail the delivery of the Certificate 1 in Furnishings. He referred her to the National Training Information Service website which sets out the competencies for each qualification but does not supply the programmes to obtain those competencies. He expected Ms Hancock as a registered teacher to be able to develop such a program. Mr Cotton said he asked Ms Hancock several times at meetings in her office to prepare a program, however, except for a one page lesson plan, Ms Hancock did not produce a program. When he did not receive the program he said he issued Ms Hancock with a formal verbal warning. In her evidence Ms Hancock denied meeting with Mr Cotton on several occasions in her office (in fact she said she did not have an office) or being issued with a warning.
- [19] The students at Djarragun College only undertake VET subjects one day per week and courses are generally completed over a two year period. However, in the end of Semester 1 reports Ms Hancock had assessed all students as competent in all competencies for the Certificate 1 in Furnishings. Mr Cotton was immediately concerned because given the time it takes to deliver the course and the competency levels of the students it was not possible for the students to have completed all the competencies. Following a meeting where Mr Cotton raised his concerns, Ms Hancock deleted two competencies. Mr Cotton did not know why those two competencies were selected.

- [20] Mr Cotton asked Ms Hancock to come into the College to rewrite the reports. Although Ms Hancock complied with this request the reports were inadequate so Mr Cotton rewrote the reports so they would address the one competency covered in the course. Mr Cotton also asked Ms Hancock to meet with him on return from the school holidays.
- [21] At this meeting Mr Cotton conducted a performance appraisal of Ms Hancock. The performance appraisal document is in a different format to that of the 2007 performance appraisal conducted by Mr Shankaran. The 2008 document is entitled "Djarragun College Performance Management Teachers 2008". Despite the difference in title and format the report of Ms Hancock's performance was less than satisfactory. Like the 2007 appraisal it also identified inadequate planning, the need for improved lesson delivery and reporting on student progress and outcomes. In relation to the latter specific concerns were raised about Ms Hancock's assessment of competencies in light of the problems encountered with the end of Semester 1 reports.
- [22] It was around this time that other teachers complained to Mr Cotton about Ms Hancock's failure to look after art materials. Ms Hancock considered their complaints to be unfounded because she contended that some of the teachers were unqualified in Art. Ms Illingworth said that the teachers were qualified.
- [23] Mr Cotton had kept Ms Illingworth abreast of his concerns about Ms Hancock's performance and had alerted her to the complaints from other teachers which resulted in divisiveness amongst staff. When, despite the assistance Ms Hancock had been given, there was no improvement in her teaching performance and in light of the concerns now raised by other staff about Ms Hancock, Mr Cotton was given approval by Ms Illingworth to terminate Ms Hancock's employment. He said that he telephoned Ms Hancock just after 3.00 p.m. to ask her to come to the administration area. Mr Cotton was waiting in the board room with the Assistant Principal. After waiting for about 20 minutes Mr Cotton went to locate Ms Hancock who, by then, had arrived in the administration area. Ms Hancock immediately asked whether the issue was about the previous Friday when she was sick. Mr Cotton informed her the meeting was not about that but it concerned a serious matter.
- [24] Mr Cotton said he referred to the performance meetings that had been held with her and because she had not made the required changes to her performance the decision had been made to terminate her employment. Ms Hancock was asked to leave the premises that day and was paid six weeks' notice.
- [25] Ms Hancock denied receiving a telephone call from Mr Cotton asking her to go to the administration area. She said she was heading in that direction to pick up bus keys when she was told by another staff member that Mr Cotton was looking for her. It is common ground that Ms Hancock was not told the purpose of the meeting nor was she advised that she could have a support person present.
- [26] Ms Hancock believes that the College had few problems with her performance until she was moved out of the senior secondary school and into the VET area. There, she said she experienced considerable hostility from unqualified teachers working in Art. She claimed those teachers bullied and intimidated her and when that failed, they complained to Mr Cotton and Ms Illingworth. The inference to be drawn was that these complaints precipitated her dismissal.
- [27] Mr Cotton apprised Ms Illingworth of complaints from co-workers about Ms Hancock. Ms Illingworth also referred to complaints received from other teachers in the Art department about Ms Hancock's disorganisation but made clear that these concerns were not the cause of the dismissal.
- [28] In her cross-examination of Mr Shankaran Ms Hancock put that she had raised with him a concern about another co-worker bullying her. Mr Shankaran had no recollection of Ms Hancock ever raising the issue with him nor, he said, was he involved in any meeting about the incident. Ms Illingworth, too, had no recollection of receiving reports from other staff or a complaint from Ms Hancock that she was being bullied.

Conclusion

- [29] In her evidence Ms Hancock's recall or version of events was remarkably different to the evidence given by the witnesses for the College. I accept that on occasion witnesses for the College could not remember precise dates of particular events, however, despite any such omissions, having observed the witnesses and assessed their testimony, I found their evidence to be more reliable and plausible. Where there is a difference in the evidence between Ms Hancock and the witnesses for the College, I prefer the evidence of the College's witnesses.
- [30] Section 77 of the *Industrial Relations Act 1999* (the Act) obliges the Commission to consider a number of matters in order to determine whether a dismissal was harsh, unjust or unreasonable. The first of these is whether Ms Hancock was notified of the reason for her dismissal: s. 77(a). I am satisfied that Ms Hancock was told that the reason for her dismissal was poor performance. She was notified of this both by Mr Cotton orally and then in writing by Ms Illingworth in the termination letter dated 25 August 2008 handed to her at the conclusion of the termination meeting.

- [31] The next matter the Commission must consider is whether the dismissal related to Ms Hancock's conduct, capacity or performance: s. 77(b). Ms Hancock's submissions suggest that her dismissal did not relate to any of these matters but resulted from her complaints made against other teachers. In contrast, all of the evidence from the witnesses for the College was clear and consistent that the dismissal related to her performance.
- [32] The evidence from Mr Shankaran is that in 2007 Ms Hancock worked well with other staff. The first time that Ms Hancock encountered difficulties with two of her co-workers was in 2008. Ms Hancock raised some of the difficulties with Ms Illingworth who put in place some remedial action. I do not accept that after that Ms Hancock attempted to raise further matters with Ms Illingworth. In light of the evidence from the College I am also satisfied that any complaints of bullying were they in fact made by Ms Hancock did not contribute to the decision to dismiss her.
- [33] The evidence is that when concerns about Ms Hancock were raised by other staff members attempts were made for resolution. However, when the matters were not resolved then in light of the continuing performance issues the decision was made to terminate Ms Hancock's employment. The issues with the co-workers were contributing factors to, but not directly causative of, the dismissal.
- [34] Because of the contributions Ms Hancock made to the College in extra-curricular activities the College was keen to find an appropriate teaching niche for her. Perhaps because of her value in non-teaching activities the College dealt more sympathetically with Ms Hancock than it would have done with another teacher with the same level of performance issues. The College placed Ms Hancock in various teaching positions but the performance issues recurred. Having considered the evidence in totality I am satisfied that the reason for the dismissal related to Ms Hancock's performance and accordingly, s. 77(b) of the Act has been satisfied.
- [35] Section 77(c) of the Act requires that where a dismissal relates to an employee's performance the employee must either have been warned about the performance or given an opportunity to respond to the allegation about the performance. Ms Hancock contended that she was neither warned nor given an opportunity to respond to the allegation about her performance. The College relied upon the performance appraisals conducted by Mr Shankaran in 2007 and Mr Cotton in 2008 as well as the "formal verbal warning" given by Mr Cotton to Ms Hancock in 2008. Reference was also made in Ms Illingworth's evidence to various verbal warnings she believed had been given to Ms Hancock by both Mr Cotton and Mr Shankaran.
- [36] I am satisfied that Mr Shankaran identified issues of concern about Ms Hancock's teaching performance with her at various times in 2007. I also accept the evidence of Mr Cotton that in 2008 he met with Ms Hancock in her office on several occasions and raised concerns about her performance with her. That Mr Cotton gave Ms Hancock a "formal verbal warning" was not specifically put to her in cross-examination but was mentioned by Mr Cotton in oral evidence-in-chief. Given the circumstances of that evidence the Commission does not place any weight on it.
- [37] The 2008 performance management document states that "There is little value in using this document as a way of assessing poor performance". At first blush though, it appears that this is how Mr Cotton used the form. On reflection of his evidence I am satisfied that the document was not used to assess poor performance, rather assessments had been made and feedback provided by Mr Cotton throughout 2008 in a less formal way. The 2008 performance management document was used to gather together, record and formally notify Ms Hancock of concerns about her performance and to identify means by which support could be provided so that her performance could reach the required standards.
- [38] I do not accept Mr Cotton's evidence that the 2008 performance management document was a warning. The document specifies that "The whole process is focussed on support and encouragement rather than on a punitive model". Indeed, the final comments made by Mr Cotton at the conclusion of the document encourage Ms Hancock to reach her potential.
- [39] I also do not accept the evidence of Ms Illingworth that identification of performance concerns constitutes verbal warnings. The concerns were raised not in the context of a discipline process but in a formative, developmental framework and as such cannot be construed as disciplinary measures.
- [40] Ms Hancock did not sign the documents, however, it was her evidence that she was provided with a copy of the 2008 performance appraisal. Neither party was clear whether Ms Hancock was given a copy of the 2007 appraisal. Clearly, it would have been better management practice to have the parties to the performance appraisal sign and date the document and to record provision of a copy to the employee to ensure no dispute arose about the issues raised or that the issues were, in fact, raised.
- [41] The performance appraisals both in 2007 and 2008 identified serious issues of concern with Ms Hancock's teaching performance. In 2007 in particular Ms Hancock was provided with a range of measures designed to assist her improve her performance. When this did not occur the decision was made to relocate her to another

area where the College hoped that she may have been able to perform at a satisfactory level. The evidence does not show that Ms Hancock was advised that she was being moved to the VET area because of unsatisfactory performance. Ms Hancock seems to have believed that she was helping out the College by agreeing to teach in this area. In the VET area not as much teaching support was provided but I am satisfied that Mr Cotton met with Ms Hancock reasonably regularly to provide guidance.

- [42] In determining whether s. 77(c) of the Act has been satisfied the Commission considers that Ms Hancock was not warned about her performance. The sub-section also provides the alternative of whether the employee was given the opportunity to defend against the allegation of poor performance. On this matter the Commission is satisfied that the opportunity to defend was given in the performance appraisal meetings. Ms Hancock acknowledged that the performance reviews had occurred although she seemed not to realise the serious nature of the concerns that were being raised. In my view her lack of understanding about the quality of her performance is indicative of the problems the College was encountering with Ms Hancock's performance.
- [43] Again, it would have been better management practice for the College to have moved from the performance review process to a disciplinary process in order to press home its level of concern with Ms Hancock's performance. However, in the circumstances of this case this omission is not fatal. Ms Hancock had the opportunity to respond to the criticisms levelled in the performance appraisal. Regrettably, she elected not to respond to the performance issues raised with her by Mr Cotton at the performance appraisal meeting. Any teacher who received a performance review which was severely critical of almost every aspect of their teaching performance ought to have taken the opportunity in the appraisal meeting or shortly thereafter to provide some response to either provide reassurance that the deficiencies were temporary or to demonstrate the steps being taken to improve in order to restore confidence in their performance.
- [44] Section 77(d) of the Act also allows the Commission to consider any other relevant matters in deciding whether a dismissal was harsh, unjust or unreasonable. In this regard I consider a relevant matter to be the absence of an appropriate VET qualification to teach the Certificate 1 in Furnishings.
- [45] Although Ms Hancock agreed to teach in the VET area it is her evidence that she does not have the qualifications to teach the Certificate course for which she was programmed. The evidence from Ms Illingworth is that she was told that Ms Hancock had the requisite qualification. Mr Cotton said Ms Hancock told him of her extensive experience in the industry. Ms Hancock did not mention to Ms Illingworth or Mr Cotton that she did not have a Certificate 1 in Furnishings or similar when the matter of teaching the course was raised with her. It is clear from her evidence, when she was discussing the project the students had undertaken, that she had a reasonable level of knowledge about woodworking. Had Ms Hancock possessed a reasonable level of experience she may have been able to be assessed in order to be deemed to have an equivalent qualification but this process was never undertaken nor was it broached as a possibility by either the College or Ms Hancock.
- [46] The complaint about the lack of qualifications has been raised very belatedly given that at no stage during her employment had she raised this as a concern. However, it is hardly surprising Ms Hancock encountered difficulties in delivering the program when she did not possess the requisite certificate qualification. The Commission understands that a Certificate 4 in Training and Assessment was also required to teach and assess VET subjects. Although the College provided Ms Hancock with some assistance to undertake this qualification she had not completed it at the time of her dismissal. Absent the particular qualification in the area and regardless of the information on the NTIS website it would be difficult for any teacher to properly deliver a VET program. Moreover, the Commission understands that where a person does not have the qualification at least to the level of the certificate level being taught there are serious implications for the provider of the training and puts at risk the issue of the certificate.
- [47] By placing Ms Hancock in the VET area the College set Ms Hancock up to fail. I accept this was done quite unintentionally and with the acquiescence of Ms Hancock but it was the inevitable consequence.
- [48] Another relevant matter is Ms Hancock's complaint, contained in her final written submissions, of having "no training or experience in teaching English, other than very brief Supply Teaching and a short sojourn teaching Conversational English in Japan". If that were true it begs the question as to why she accepted appointment in the first instance as an English/Art teacher. Ms Hancock does not have extensive experience in teaching English, however, the summary of her experience outlined at the start of this decision does not support the contention that she possessed no experience in teaching the subject. Ultimately Ms Hancock was teaching English at quite a low level and it is a requirement that teachers supplement gaps in their content knowledge.
- [49] During the cross-examination of Ms Hancock she showed she had a great deal of difficulty understanding some fundamental requirements of the work of a professional teacher. This is despite her being a teacher since 1983. The termination letter indicates that other placements in the College were considered but given her inability to deliver learning programs despite the assistance measures afforded to her this was not a viable option. The truth of the College's concerns about Ms Hancock's teaching performance as recorded in this letter and elaborated on in the hearing was borne out in her own evidence.

- [50] In my view, given the teaching performance issues which had come to light in 2007 Djarragun College had cause to not permanently appoint Ms Hancock in 2008. Re-appointment when such significant performance issues had been identified and raised with her could have only sent mixed messages to Ms Hancock. In light of the complaints now made the College was not diligent about handling the serious performance issues which had arisen. No attempt was made to escalate the concerns to invoke disciplinary measures and this omission resulted in Ms Hancock not being fully apprised of the extent of the College's concerns about her performance.
- [51] Ultimately, the problems Ms Hancock experienced in 2008 were largely the result of not having the requisite qualifications to teach and assess the VET program. In part, Ms Hancock contributed to the circumstances in which she found herself by not identifying that she did not possess the essential qualifications. The College too was remiss in not satisfying itself that she held the required qualifications particularly given that the VET sector is quite specific about the qualifications to be held by those delivering a program.
- [52] I am not however satisfied that these combined omissions can cause the dismissal to be described as harsh, unjust or unreasonable. By the time the problems in the teaching and assessment of VET became significant Ms Hancock had exhausted the good will that had been generated by her commitment to the extra-curricular program. Throughout much of her employment at the College her teaching performance had been unsatisfactory. She had been moved to various positions within the College and provided with varying levels of teaching support all in order to assist her achieve a satisfactory standard. Having exhausted all avenues the College could not find another position for her. Ms Hancock was paid six weeks' notice, four weeks more than was required by law and her contract. In all of the relevant circumstances and taking a global view of the matter the Commission cannot find that the dismissal was unfair so as to cause the Commission to intervene.
- [53] The application is refused.

G.K. FISHER, Commissioner.

Hearing Details:

2010 1 February
 11 and 12 March
 19 March (Applicant's submissions)
 20 April (Respondent's submissions)

Appearances:

Ms D. Hancock on her own behalf.
 Mr C. Pollard, Jones Ross on behalf of Djarragun College.
 Released: 7 May 2010