

Review Committee Report

Review of Decision

Decision to terminate the employment of Dr Tim Anderson

INTRODUCTION

This report concerns a review of a proposal by the University of Sydney to terminate the employment of Dr Tim Anderson, Senior Lecturer, Department of Political Economy within the School of Social and Political Sciences in the Faculty of Arts and Social Sciences. Dr Anderson requested a review of the University's decision in accordance with clause 460 of the University of Sydney Enterprise Agreement 2018-2021 (the Agreement).

In accordance with the requirements of clause 462 of the Agreement, members of the Review Committee (the Committee) are as follows:

Ms Janice McLeay, Chair;
Professor Philippa Pattison AO; and
Dr Neil Maclean.

TERMS OF REFERENCE

The Agreement requires that the Committee is to make a recommendation to the relevant Delegate in relation to the proposed course of action under review, having regard to the matters specified in clause 465.

The relevant matters listed in clause 465 are as follows:

- (c)(i) whether any *Misconduct or Serious Misconduct* occurred, and any factors in mitigation;
- (d) whether the procedures that were followed afforded the staff member the procedural fairness afforded by clauses 384(c) and (d), and if not, whether the outcome was affected by any procedural defect that may have occurred; and
- (e) whether the proposed termination is reasonable in the circumstances.

RECOMMENDATIONS

The Committee has reviewed the proposed decision to terminate the employment of Dr Tim Anderson.

Ms McLeay and Prof Pattison endorse the proposed course of action, based on the findings that:

- Serious Misconduct has occurred;

- the procedures that were followed afforded Dr Anderson procedural fairness in accordance with the Agreement; and
- the proposed termination of Dr Anderson's employment is reasonable in the circumstances.

Dr Maclean does not endorse the proposed termination of Dr Anderson's employment. This recommendation is based on the findings that:

- a finding of misconduct is supported by the evidence before the review;
- there are systemic factors in the process that mitigate against a finding of serious misconduct; and
- the proposed termination of Dr Anderson's employment is not reasonable in the circumstances.

The Committee's reasons are set out in separate sections later in this report.

BACKGROUND

Dr Anderson has been employed by the University since 16 February 1998. He is a Senior Lecturer in the Department of Political Economy.

During 2017 following a series of correspondence, Dr Anderson was given a written warning in regard to breaches of the Code of Conduct and the Public Comment Policy. A further written warning was issued on 19 October 2018. When Dr Anderson was informed of the proposed decision to terminate his employment by correspondence dated 3 December 2018, he elected to have the matter referred to a Review Committee pursuant to clause 460 of the Agreement.

Clause 466 of the Agreement details how the Committee is to work and states that the Committee will determine its own procedures but in doing so:

- (a) *will provide the staff member (or their Representative) and the relevant Delegated Officer's representative with a reasonable opportunity to make submissions, present and challenge evidence in relation to the matter before the Review Committee;*
- (b) *may conduct interviews with the staff member and other persons, and examine documents as it thinks fit;*
- (c)
- (d) *will ensure that the staff member (or their Representative) and the Delegated Officer's representative have a reasonable opportunity to see and/or hear all evidence to be considered by the Review Committee and to ask questions of any persons interviewed by the Review Committee; and*
- (e) *make its report available to the relevant Delegate within 10 working days of being convened or such longer period as may be approved by the Delegated Officer (Staffing).*

The Committee was convened and met on 17 December 2018 to determine the procedures to be adopted in order to consider the proposed decision.

The Committee met on 24 January 2019 in the Boardroom of the Business School, together with

- Dr Anderson, the staff member whose position is affected by the proposed decision, and
- Mr Ashley Fry, on behalf of the Delegate.

Provost and Deputy Vice Chancellor, Professor Stephen Garton, attended for part of the meeting during which he was required to provide information to the Committee and answer questions. He was not required for the balance of the proceedings.

Mr Frank Strbik, Associate Director Workplace Relations, was present to assist the Committee. Mr Strbik assisted the Committee in the collation and exchange of material prior to and following the meeting.

The Chair outlined the proposed procedure for the Committee meeting.

Dr Anderson and Mr Fry on behalf of the University provided written submissions prior to the meeting. The purpose of the meeting was to hear any further submissions and interview those present and to allow Dr Anderson and Mr Fry with a reasonable opportunity to make submissions and to present and challenge evidence, satisfying the requirements of clause 466.

On 25 January Dr Anderson provided a supplementary written submission. His supplementary submission has been taken into account, along with all other material provided to the Committee.

The Committee did not reach agreement on all aspects of the matters to be considered. While the Chair and Prof Pattison shared a similar view, Dr Maclean had a different view.

CONSIDERATION BY MS MCLEAY AND PROF PATTISON

Dr Anderson referred to the three issues in clause 465 that he believed were relevant. We will deal with each in turn.

Whether any Misconduct or Serious Misconduct occurred, and any factors in mitigation

Dr Anderson submitted “This matter arises because of a confrontation over principles regarding public comment.” Mr Fry on behalf of the Delegate rejected the assertion, stating “Rather, the matter has arisen because, on multiple occasions, Dr Anderson has contravened the Code of Conduct, which is binding on him by virtue of his employment with the University, and because Dr Anderson has deliberately contravened the warnings issued to him in relation to his conduct.”

Dr Anderson denied that any of his actions constituted Misconduct or Serious Misconduct. Mr Fry said that Dr Anderson’s conduct constituted Serious

Misconduct in that he was issued with a written warning in August 2017, a final warning in October 2018 and immediately acted in direct breach of that warning.

Dr Anderson noted that he did not agree with the confidentiality required by the University and he distributed information the University required to be kept confidential. This was not a matter of choice, personal judgement or interpretation. As an employee of the University Dr Anderson is required to abide by the Code of Conduct and other policy documents. As an example, the Code of Conduct states that it applies to all University staff and that “*All staff are required to comply with the obligations set out in this Code and act in a way that furthers the University's objects and upholds its values.*” It states that the University “*may take disciplinary action against staff for a breach of the Code*”.

Under the heading Public Comment, the Code states:

“Staff and affiliates are encouraged to engage in debate on matters of public importance.

However, staff and affiliates who make public comment or representations and, in doing so, identify themselves as staff or affiliates of the University must comply with the University's Public Comment Policy.”

The Public Comment Policy requires that “*Statements should be accurate, professional and exercise appropriate restraint*” when made by staff or others identifying themselves as being associated with the University.

Dr Anderson refused to remove a photo of friends at lunch, saying that he had removed the University of Sydney tag from his Twitter and Facebook accounts in 2017. However, evidence before the Committee showed that he continued to identify himself as being an employee of the University in April 2018. Another graphic of concern showed an altered Israeli flag. Dr Anderson claimed that the swastika superimposed over the Israeli flag was not visible at normal magnification, and that Prof Garton’s actions “show a hyper-sensitivity to Israel”. We have seen the image provided by Dr Anderson and cannot agree with his description of it. The swastika is clearly visible, highlighted by a stripe of red over the blue and white flag. In our view, it is reasonable to find the image offensive. Prof Garton said that the University checked the image after it had been the subject of formal complaints, and was satisfied that it was offensive.

Posting the image was seen as misconduct, which is defined in the Enterprise Agreement as follows.

“Misconduct means conduct or behaviour of a kind which is unsatisfactory. Examples of conduct or behaviour which may constitute Misconduct include:

- (a) a breach of a Code of Conduct (as defined in this clause);*
- (b) a refusal or failure to carry out a lawful and reasonable instruction.”*

The definition of serious misconduct is given as follows.

“Serious misconduct means:

- (a) serious misbehaviour of a kind that constitutes a serious impediment to the carrying out of the staff member’s duties or to other staff carrying out their duties; or*
- (b) a serious dereliction of duties.”*

Examples of serious misconduct given in the Agreement include (a) a serious breach of the Code of Conduct and (f) persistent or repeated acts of Misconduct. The University relied upon conduct fitting both these examples in coming to the decision to terminate Dr Anderson’s employment.

Dr Anderson stated to the Committee that the University had not pointed out anything that constituted a reasonable impediment to him carrying out his duties. Such an impediment is another of the examples provided in the definition. However, we are of the view that a serious breach of the Code of Conduct and an ongoing refusal to abide by a reasonable instruction does constitute a “reasonable impediment” to an employee carrying out his duties to his employer.

Dr Anderson pointed to factors in mitigation of his conduct, being that he is a part-time academic and has never presented his political comments and criticisms as representing the University. In addition he said in the case of complaints made in 2018, he is not linked to the University with any of his social media accounts.

The Code of Conduct does not have differing standards for full-time, part-time or casual staff. The Code applies equally to all employees of the University. Dr Anderson acknowledged that in 2017 his Twitter and Facebook accounts identified him as a Senior Lecturer at the University of Sydney. There was no evidence of any disclaimer, separating his views from those of the University, at any time. He continues to publicly identify himself as an academic at the University, including in his listing as Director of the Editorial Board of the Centre for Counter Hegemonic Studies (CCHS). That listing, at the time of writing this report, reads: *Dr Tim Anderson, (University of Sydney), Director*. As late as October 2018, Dr Anderson’s Facebook message, incorporating the altered flag image, provided a link to CCHS.

Dr Anderson also argued that Clause 315 of the University of Sydney Enterprise Agreement 2018-21 on intellectual freedom “qualified” the application of the Code of Conduct. In response, Mr Fry argued that the Enterprise Agreement requires unambiguously that staff members comply with the Code of Conduct and that Clause 315 of the Enterprise Agreement does not provide an unfettered right to a staff member to say or post whatever they want. He noted that this position was also consistent with the University’s Charter of Academic Freedom. Rather, he argued, Clause 317 of the Enterprise Agreement requires the commitment of all parties to the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal

standards. Professor Garton argued, and we agree, that the Code of Conduct acts to ensure – and is here being applied to ensure – those high standards. Dr Anderson’s proposed standard of “factual, in the public interest, no abuse” is one that is not endorsed in the Agreement or other policy document of the University, and cannot over-ride the requirements of employees to abide by agreed standards.

We are therefore not satisfied that the issues raised by Dr Anderson are sufficient to mitigate against his ongoing conduct.

Whether the procedures that were followed afforded the staff member the procedural fairness afforded by clauses 384(c) and (d), and if not, whether the outcome was affected by any procedural defect that may have occurred

There was a series of correspondence and emails provided to the Committee, showing that allegations of misconduct were put to Dr Anderson from Professor Jagose on 30 May 2017, with him responding to her in writing on 6 June. The National Tertiary Education Union wrote on behalf of Dr Anderson to Prof Garton on 9 June, with a response from the Chief HR Officer on 23 June. Prof Garton provided further allegations to Dr Anderson with further particulars on 26 June. Dr Anderson responded on 5 July. On 2 August 2017 Dr Anderson was given a written warning.

The letter issued on 2 August 2017 set out the University’s reasons as to why the allegations were substantiated and included the following:

“I am satisfied that Disciplinary Action within the meaning of clause 309 of the Enterprise Agreement is appropriate. Accordingly, please treat this letter as a written warning in relation to your Conduct.

You must, hereafter, appropriately discharge obligations pursuant to your contract of employment with the University, the Enterprise Agreement and the Code of Conduct - Staff and Affiliates and the Public Comment Policy going forward. I specifically remind you of the requirement to exercise good and ethical judgement in any public comment, demonstrate professionalism (including in public comment) and exercise appropriate restraint. I also remind you of your obligations to act fairly and reasonably, and treat all relevant persons, including staff and members of the public, with respect, impartiality, courtesy and sensitivity.”

On 3 August 2018 Prof Jagose directed Dr Anderson to delete some social media posts relating to a Channel 7 News story. Dr Anderson rejected the direction and accused Prof Jagose of censorship. When Prof Jagose detailed a second set of allegations to Dr Anderson, he submitted a bullying complaint against her. In order to protect the University’s long-term interests, Prof Garton took over the running of the matter, which was put on hold pending the investigation into the bullying in complaints. On 19 October Prof Garton wrote to Dr Anderson advising that the second allegations were largely substantiated, and issuing a final warning.

On 26 October Prof Garton wrote to Dr Anderson detailing further allegations relating to social media posts, seeking a response by 12 November. Dr Anderson responded on 27 October.

Dr Anderson in an email to his Political Economy colleagues stated that insufficient detail was provided to him, while referring in the same email to the various statements that he had posted. It is clear that Dr Anderson was aware of the University's concerns, although he disagreed with them. In the 2017 correspondence Dr Jagose and Prof Garton used words and phrases from the Code of Conduct, clarifying the breaches that were alleged.

We note that undated screenshots were provided in correspondence to Dr Anderson, but that no objections were raised by Dr Anderson to the relevance of the screenshots provided to him.

We are satisfied that the procedures set out above afforded Dr Anderson the procedural fairness as required in clause 384 of the Agreement. In particular we note that the allegations were provided in sufficient detail and that Dr Anderson was given a reasonable opportunity to respond to the allegations against him.

Whether the proposed termination is reasonable in the circumstances

We note Dr Anderson's 20 years of employment with the University and his long record of sustained research. The University made no criticism of Dr Anderson's teaching capacity or expertise. However, the University has a right to set standards, as set out in various policy documents, and to interpret materials in accordance with those standards. Dr Anderson does not have the right to ignore the decisions made in accordance with the University's written policies and procedures.

In his submission to the Committee, Dr Anderson accused Prof Garton of completely ignoring the intellectual freedom formulation in the Enterprise Agreement, and said that Prof Garton "maintained his emphasis on offensiveness along with some other arbitrary and vague notions". He suggested that words used by Prof Garton "Simply become vehicles for Stephen Garton to repeatedly attempt censorial intrusions into the private and professional expression, according to his own personal views."

There is no evidence to support the claim that Prof Garton intruded into Dr Anderson's personal views. The documentation provided to the Committee shows that Dr Anderson was clearly identified with the University. Although he said that he removed reference to the University from his Facebook and Twitter accounts in 2017, he had clearly identified himself as an employee of the University. As recently as 4 December 2018 Dr Anderson made reference on Facebook to his position as senior lecturer at the University of Sydney, when he posted the letter from Prof Garton in regard to the outcome of further allegations and the proposed decision to terminate his employment, together with personal comments about its contents.

In his correspondence to Dr Anderson, Prof Garton has used the word offensive to describe some of Dr Anderson's post on social media, but he has also used words from the Code of Conduct and the Public Comment Policy, stating precisely the clauses from which he has quoted. We do not agree that Prof Garton's words are "vehicles ... to repeatedly attempt censorial intrusions".

In a supplementary submission to the Committee, Dr Anderson stated that he did not agree that a photo objected to by the University, referred to by himself as 'friends at lunch', promoted racial hatred or racial violence. He stated "With that in mind I refused to censor the photo". He referred to a graphic of an Israeli flag overlaid with an image of a Nazi swastika that he had posted, which Prof Garton had described as "disrespectful and offensive". Mr Anderson said that the criticism was taken out of context and that "an honest person looking at this post will see a discussion of casualty claims (and how to use evidence) during Israel's 2014 assault on Gaza".

We are of the view the use of the altered image of the Israeli flag is likely to be offensive to many people and does not serve an articulated academic purpose. Dr Anderson's statements about the image included that he borrowed it from elsewhere and that he did not notice the distortion when he chose to use the image. He said that the University cannot intervene with his academic freedom on the basis that some people may be offended. Prof Garton did not state any objection to the statistics or other information on the document. We agree with Prof Garton's assessment that it was not necessary to use the altered image of a flag, regardless of its source. We believe the use of a swastika in the context of the teaching material about the 2014 attack is offensive, and we believe there is no argued academic case for its use in this context. We therefore reject Dr Anderson's appeal to intellectual freedom in the University of Sydney Enterprise Agreement 2018-21 as the basis for using the image in teaching or posting it on social media, since we judge that these actions do not meet "the highest ethical, professional and legal standards" required by clause 317.

The fact that the image was re-posted after the University's letter to Dr Anderson, illustrated his unwillingness to abide by the Code of Conduct and a breakdown of his relationship with his employer.

The breakdown in Dr Anderson's relationship with his employer is further illustrated by his final comment in his supplementary submission. That comment reads as follows:

"I conclude that Stephen's insistence that my 'Gaza casualties' graphic was offensive and sanctionable flows from his reactionary and outdated political views. He has attempted to elevate a reactionary political view into an ethical critique. I say this is illegitimate."

Prof Garton expressed no political views either before the Committee or in his written statement. His reasons for coming to a decision to terminate Dr Anderson's employment with the University was set out in objective terms. He described the University's response to complaints, in that each complaint is considered on its merits and that in the past the University has defended Dr

Anderson's conduct when controversial statements have been complained about. Prof Garton supported the right of all staff to express unpopular or controversial views so long as the exercise of intellectual freedom is in accordance with ethical, professional and legal standards, noting that the Code of Conduct sets out the standards required by the University.

In an email of 27 October 2018, addressed to Prof Garton, Dr Anderson wrote

- “I categorically reject your letter of 19 October, along with your clumsy, unprincipled attempts to act as political censor of my public comments.”
- “Your evasiveness on this matter leads me to conclude that you have little respect for intellectual freedom.”
- “Some of your comments are garbled and contradictory.”
- “You make false statements ...”
- “This accusation is a case study of how little you respect your colleagues' rights.”
- “What I object to is your abusive behaviour as a manager.”
- “Your dishonesty and lack of commitment to principle makes any further dialogue pointless.”

In his response to the University's submissions, Dr Anderson referred to Prof Garton's “conceit”, accusing him of “abusing my rights and triggering a scandal over lack of freedom of speech at the University”.

Prof Garton expressed the view that Dr Anderson's conduct throughout the disciplinary process has demonstrated that there is little, if any, prospect than a constructive employment relationship can be established or maintained. In his email of 27 October 2108, Dr Anderson stated that he will continue to use the graphic that he was instructed not to use.

Taking into account all the information and argument put to us, we agree with the assessment that a constructive employment relationship is unlikely to be able to be restored. The refusal to follow a reasonable instruction is a serious breach of the Code of Conduct and satisfies the definition of serious misconduct in the Agreement. Dr Anderson has been given procedural fairness. He has offered no mitigating circumstances that would excuse his conduct. It follows that the proposed termination of employment is reasonable in the circumstances.

CONSIDERATION BY DR MACLEAN

Criteria for Findings of Misconduct

It was agreed at the start of the review that the appropriate policies in determining the case were the definitions of Misconduct and Serious Misconduct in Part A of the EBA; Clause 315 of the EBA on Intellectual Freedom; The procedures and criteria laid out in Part N of the EBA; The Code of Conduct; the Public Comment Policy; the University of Sydney Charter of Academic Freedom.

What was contested in the exchange of letters and submissions was how these various aspects of policy should work in relationship to each other. The Delegate relied primarily on the Code of Conduct to make the case for misconduct. They argued that clause 315 “does not define ‘intellectual freedom’ and is not expressed to prevail over other provisions in the Enterprise Agreement”. Dr Anderson argues that clause 315 must modify the code of conduct if criteria of what might reasonably be regarded as offensive are used to assess compliance with the code of conduct precisely because exchanges on controversial issues are inevitably offensive to many.

It should be stated at the start that the relevant provision of the clause on Intellectual Freedom is 315 (b)(iv), the right to “express unpopular or controversial views, provided that in doing so staff must not engage in harassment, vilification or intimidation”. No attempt has been made to argue that Dr Anderson engaged in “harassment, vilification or intimidation”. The focus has been on the Code of Conduct and, less explicitly, the Public Comment Policy.

Dr Anderson proposes his own criteria for the exercise of academic freedom: Factual, In the public interest, No Abuse. These seem to me to be consistent with the Code of Conduct requirement of staff to “exercise their best professional and ethical judgement”. It is also consistent with the requirements of professional judgement that staff formulate their own concrete criteria for the exercise of academic freedom. As the Delegate recognizes University policy does actually define academic freedom, presumably because the way it has to be pursued varies across the complex array of contexts and disciplines within the University. I do not, then, think it is valid for the Delegate to simply declare that Dr. Anderson’s criteria are “inconsistent” (para 9, UsydReplySubmission) with the Code of Conduct.

Dr Anderson has consistently argued that if the Delegate or the Provost is to make findings of misconduct and serious misconduct against a staff member on the basis of allegations, then procedurally it is not enough that the staff member to have a right of reply to those allegations; the basis for a finding in response to those allegations has to be argued. He has also consistently argued that ‘minimalist’ judgements of what might ‘reasonably’ be taken to be ‘offensive’ are not adequate to making a case for misconduct. Some other criteria of argument are required. This is his case that this that the provision on Intellectual Freedom in the EBA “related to controversial matters (where offence is common place) does indeed ‘qualify’ the Code of Conduct”. In my view these are serious weaknesses in the process that we are reviewing and should mitigate against any case for termination of employment.

Allegations

On 10 August Dr Anderson received a letter outlining 7 allegations of misconduct arising from a Facebook post on 22 July 2018.

The chain of events that followed Dr Anderson’s post of the lunch in Beijing in which the offending armpatch featured reveal the significance of the obligation to argue for a finding of misconduct. The initial Post was on 22 July. The Channel 7 newscast that preceded the further social media posts on 2 August made the armpatch an

issue by proposing a translation of the armpatch and by making claims about its intentions. No clear argument has been made that this post in itself was misconduct. Dr Anderson has argued that it was simply a post of friends at lunch. I think that is a reasonable argument in mitigation. Nor can I see that any case has been made that the responses directed at Bryan Seymour were derogatory or offensive. Dr Anderson argues (Anderson to Provost 26/10/2018) that claims about colonial media and apartheid Israel should reasonably be taken to reference political analysis and ethical positions that Dr Anderson has filled out in his published academic work. Yet these findings have been reiterated all the way through the process. It is particularly telling that the most serious aspect of Allegation 1 of the letter of 10 August that the post “can be considered as endorsing or promoting racial hatred and/or racism” was not sustained in the Provost’s findings of 19 October, due in part to uncertainties or argument about the translation of the text. This opened to question the original direction to remove the post.

Nevertheless, it is clear that the Channel 7 news story of early August and, as I understand it, subsequent complaints about the posts, made this series of posts a matter of legitimate concern for the Dean and subsequently the Provost. It is also the case that, despite Dr Anderson’s initial denials, his Facebook page identified him as a member of staff at The University of Sydney. Furthermore, this is a completely public Facebook page. There is no basis for Dr Anderson’s claims that the investigation of his posts and of subsequent allegations of misconduct form part of a conspiracy of any kind or of any kind of bullying. All the policies referred to at the start of this report make it clear that the University has a legitimate interest in such complaints.

In summary no compelling case has been made that the actual posts themselves justify findings of misconduct. What is clear is the systematic refusal by Dr Anderson of the authority of the Dean and the Provost in these matters, and of their right to investigate and make findings. These refusals have themselves led to further findings of misconduct.

In my view the lack of compelling case that the posts themselves justify a finding of misconduct compromises any finding of serious misconduct that depends on these allegations as part of a series (see definition of serious misconduct (f)). As I understand it no individual finding of serious misconduct has been made against Dr Anderson and the Delegate has been arguing for a finding of serious misconduct on this basis of criterion (f).

The Provost’s letter to Dr Anderson on 19 October takes the form of a final warning. It is the further allegations of 26 October that precipitate the case for termination of employment.

Further Allegations

Further allegations were made in a response to Dr Anderson’s reposting of a slide which includes a graphic of the Israeli flag torn open to reveal a swastika. The Provost first raised concerns with this graphic in the letter of 19 October. In this letter he simply claimed that a reasonable person would find the image offensive.

Dr Anderson's response was to immediately repost the slide on Facebook and Twitter.

He has subsequently argued in two different ways: a) that the image in itself was an argument for a critique of Israel as a fascist state; b) that the image is itself so small and indistinct as to make any clear interpretation of it by a viewer impossible.

It is not the exchange of letters and submissions but the verbal exchanges in the context of the review that have been telling on this matter. Prof Garton described the image as "disrespectful and offensive". Dr Anderson said that the criticism was taken out of context and that "an honest person looking at this post will see a discussion of casualty claims (and how to use evidence) during Israel's 2014 assault on Gaza". I take it that he means that the rest of the slide either makes sense of the image or makes it irrelevant. Prof Garton went on to argue that the use of images that are intended to shock and offend image specific obligations on those using such images to articulate the academic rationale of their use. Dr Anderson explicitly rejected this obligation. Dr Anderson was asked about the source of the image and why it was included on the graphic. He was also asked how he had contextualised the significance of the image in the use of the slide in teaching. Dr Anderson himself presented evidence that the image was either sourced from, or referred to, in a blog on Facebook's blind spot to antisemitism. He did not see the source of the image, or references to it elsewhere as relevant to his usage or requiring contextualising commentary. In response to the question on the use in teaching he said that he had made no specific effort to speak to the image treating it as a small part of the larger argument of the slide that spoke for itself. Prof Garton reiterated his view that the obligation to articulate the academic rationale for the use of such images lay with those who use or publish them. He stated a particular concern for that obligation in the context of teaching. I think the Provost's view that the use of such an image requires a rationale for its use is reasonable. I do not think Dr Anderson can appeal to intellectual freedom to support the right to publish or use such an image in teaching without proper contextualisation. It is reasonable to argue that doing so does not meet "the highest ethical, professional and legal standards" required by clause 317.

The Provost's instruction not to further post or circulate the image was lawful and reasonable in the circumstances. It was consistent with the policies of the University and reasonable to expect Dr Anderson to engage in further dialogue about any further use of the image. It is reasonable to find that the reposting of the image was a case of misconduct.

Factors in Mitigation

Having said that, at the time that Dr Anderson was issued with a letter notifying him of the intention to terminate his employment, and suspending him without pay, no arguments had been put to Dr Anderson in support of findings of misconduct in relation to the actual context of his social media posts, other than that they might reasonably be found to be offensive and that they were inappropriate. Dr Anderson has consistently argued that such 'minimalist' criteria are inadequate. I agree with his view that these criteria cannot on their own be used as a basis for findings of misconduct in the to and fro of public contestation on controversial issues. In my

view Dr Anderson has made the case that doing so has lead the Dean, the Provost and the Delegate astray both in judgement and in their written cases in parts of this process. Dr Anderson has also argued (21 January 2019) that his response to the Provost was a ‘disagreement in principle’ and that the University has no ‘mechanism to assist with this’. He makes it clear that the problem here is that those in positions whose job it is to make allegations of misconduct are also the one’s required to evaluate the response by the staff member to such allegations until such point as a process of disciplinary action has already been begun.

In my view these aspects of the process mitigate against a finding of serious misconduct in this case and thus I cannot support the termination of Dr Anderson’s employment.

A final point. In the final paragraph of his witness statement (56) the Provost concludes that ‘there is little, if any possibility that a constructive employment relationship can be established or maintained in the future’. However there is no evidence that any attempt has been made to manage these allegations through his Head of School and his Professor.

ADDITIONAL COMMENTS

Clause 466 of the Agreement requires, at sub-clause (e), that the Committee “makes its report to the relevant Delegate within 10 working days of being convened or such longer period as may be approved by the Delegated Officer (Staffing)”. Because of the University close down at Christmas, a longer period was requested and granted by Ms Karen Haywood, Chief Human Resources Officer, in her capacity as Delegated Officer (Staffing). We are grateful for that extension of time.

The Committee is grateful also for the professional and courteous assistance provided by Mr Strbik and we wish to formally record our thanks to him.

Dated: 8 February 2019

Ms Janice McLeay

Prof Philippa Pattison

Dr Neil Maclean