WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00972
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	TUESDAY, 21 JULY 2020, WEDNESDAY, 22 JULY 2020, MONDAY, 21 SEPTEMBER 2020 AND BY WRITTEN SUBMISSIONS MONDAY, 19 OCTOBER 2020, FRIDAY, 30 OCTOBER 2020
DELIVERED	**:**	TUESDAY, 8 DECEMBER 2020
FILE NO.	**:**	U 124 OF 2018
BETWEEN	**:**	MR LESLIE GEORGE MAGYAR Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

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CatchWords	**:**	Industrial Law (WA) - Unfair dismissal claim - Applicant dismissed due to negligence in failing to ensure student enrolled and in failing to deliver instruction to student – Application dismissed
Legislation	**:**	
Result	**:**	Application dismissed

Representation:

Counsel:

Applicant	**:**	Mr N Marsh, of counsel
Respondent	**:**	Ms R Hartley, of counsel

Reasons for Decision

1 The applicant was employed as a teacher by the respondent from 2001 until 3 September 2017, when he was dismissed for being negligent in the performance of his functions. The respondent found the applicant had been negligent in failing to ensure that a student in his class was enrolled in a course and in failing to deliver instruction to the student in that course.

2 The applicant, immediately prior to his dismissal, worked as a computing teacher at Kent Street Senior High School.

3 Some students at Kent Street Senior High School progress toward achievement of vocational certificates. These certificates are within the purview of registered training organisations which are quite separate to the school. The courses are taught at the school but the qualification is granted by this separate entity.

4 The Certificate II in Information Technology is one such course. Students may nominate that they wish to achieve such a qualification and they will be placed in classes where the course will be delivered at the school by employees of the respondent.

5 A student must of course be 'enrolled' in the course with the registered training organisation to achieve the certificate.

6 In 2017, Kent Street Senior High School had a student who had nominated that he wished to complete the Certificate II in Information Technology. The student had been allocated to a class taught by the applicant for instruction in the course.

7 The school year started on 1 February 2017.

8 As at 14 June 2017 the student in question had not been enrolled with the registered training organisation nor had the applicant commenced giving the student any instruction in the course.

9 The applicant accepted that he did not ensure that the student was enrolled as at 14 June 2017 (ts 121) and accepted that he had delivered no instruction to the student in the course as at that date (ts 120).

10 There is really no sensible argument that can be put up against a charge that the applicant was negligent.

11 The applicant knew that the student had nominated that he wanted to progress toward achievement of the Certificate II in Information Technology and had been placed in his class for instruction in it.

12 The applicant knew that to achieve the qualification the student had to be enrolled in the course with the registered training organisation.

13 A teacher who fails to ensure that a student in his class has been enrolled in a course in these circumstances is negligent. The failure to ensure the student was enrolled occurred against a background where the applicant was aware the student was, in his words, "dragging his feet" (ts 105 and 106) in relation to enrolment. It was not as if it was fair or reasonable for the applicant to assume the student had enrolled himself. Enrolment was fundamental to achievement of the qualification and the applicant had not ensured it had occurred. That was negligent.

14 Further, a teacher who does not deliver instruction to a student in his class is negligent. A teacher is employed to teach. To not do so is negligent.

15 By way of explanation, the applicant said he did not teach the course to the student in question, and, rather, allowed him to do private study:

> Because I had a – a – a student that just was not – to me appeared to be not wanting to do the work for that subject. So I thought at the time the best course of action is do private study, don't play computer games, don't disturb anyone else, just do your English and maths work (ts 120).

16 As for when, if ever, he was going to teach the student, he said:

> … I knew that it's a – really a one-year course and we still had a year and a half to go. So we could catch up in – later in the year (ts 120).

17 The explanation is a bad one. The folly of it became clear when it emerged that the student in question was not capable of completing the course in a year, or a year and a half, with regular instruction, as the applicant had imagined. In March 2018, the applicant "started to realise" that the student was "not like my other students" and that, in fact, "he was my weakest student". (ts 96).

18 In fact, the student ended up struggling with completion of the course and needed intensive assistance to get over the line (ts 194).

19 This points up the calamity in the applicant's negligence. His failure to teach the student in the first half of 2017 meant that the student's true abilities were not known to him at that time.

20 Enrolment in the course, and the instruction in the course that would have, and should have, followed enrolment, would have allowed the applicant to assess the student's skills, and tailor his teaching to ensure the student was given every chance of achieving his goal.

21 The applicant was negligent and the consequences of his negligence became clear for all to see.

22 By way of defence, if one can call it that, the applicant took a scattergun to a range of issues, some directly related to the student in question, some much broader.

23 The applicant said that at least part of the period when the student was not enrolled, and should have been, was not his fault, or could not have been avoided by him, because the school changed the registered training organisation which ran the Certificate II Information Technology course.

24 It is true the school changed the registered training organisation around mid-March 2017, seven weeks after the commencement of the school year. An enrolment of a student before this time, with the old registered training organisation, would not have been effective and a student would have to be enrolled with the new registered training organisation after mid-March 2017.

25 This does not, however, excuse a failure to make sure the student in question was enrolled as at mid-June 2017, especially when the applicant was aware that this particular student being enrolled was an issue (ts 106). It certainly would not excuse not teaching the child.

26 The applicant also complained that the regime of teaching for the student in question, designed by others, was not appropriate. The student was supposed to be taught the course, in part at least, in the "homeroom" period, that is the period of 20 minutes between the school day commencing and the first instructional period of the day.

27 Apparently such a system is not at all unheard of at Kent Street Senior High School.

28 I think what the applicant says is that because of this system he could not effectively teach the student in question in the course in which he should have been enrolled in or, alternatively, that

because of the system he was unable to discover the student's true abilities and thus was unable to determine that he needed more intensive instruction.

29 The alleged deficiencies in the system cannot now assist the applicant to excuse a failure to enrol the student as at 14 June 2017 and to teach him from 1 February 2017 to 14 June 2017. It is irrelevant to the matter of enrolment. In relation to teaching, if this is the regime, you do what you can within it.

30 It is not acceptable to simply not teach.

31 The applicant says that not allowing students to do private study in his class was "unworkable and totally unjustified". The applicant raises this because the finding against the applicant was, in part, that he had allowed the student in question to do "private study" in circumstances where he had been "previously instructed not to allow students to use class time for private study". (See Exhibit 4, respondent's list of exhibits, letter dated 23 May 2018.) The applicant points to the fact that other teachers were allowed to simply supervise students in their classes while they did "private study".

32 There is a need to put the "previous instruction" referred to in the letter of 23 May 2018 in its proper and full context.

33 The instruction is found in a letter from the school's principal, Katherine Ward, to the applicant dated 25 November 2016 which said, in part:

> You are not to give [students] permission to do private study in your designated class time.

34 Reading the entire letter, the instruction was part of the principal addressing apparent problems with the applicant not sufficiently engaging with students in the classroom to make sure they completed their courses.

35 Pages 1 and 2 of the letter go into great detail about the apparent problems and how they are said to have arisen.

36 At page 3, the following appears, with my emphasis added:

> AITSL Standard 7.1 – Meet professional ethics and responsibilities
>
> In short, the responsibility to engage the students in the teaching and learning process sits with you as the classroom teacher.
>
> - Teach them and encourage them to achieve.
> - **You are not to give them permission to do private [study] in your designated class time.**
> - Should a student fail to work, you are obliged under our 'no surprises' policy to inform the parents/carers and to seek their support in encouraging their child to achieve.
> - Finally, you are to adhere to your code of conduct and therefore must not engage in behaviour that may bring your own reputation or that of the Department and the Public Sector into disrepute. This means that you are to stop telling students, parents/carers and colleagues that it is the fault of administration that this course is not more hands on. To reiterate, you must provide evidence of curriculum to justify the purchase of additional resources.

37 Put in its proper context the relevance of the passage in the letter, and its invocation as a particular against the applicant, are easily understood.

38 In relation to the student in question, the instruction was not "unworkable and totally unjustified". It was an instruction designed to make sure students, such as the student in question, were taught by the applicant what they should be taught to progress toward achievement of a nominated goal.

39 The applicant made a total red herring of the issue by pointing to other teachers being authorised to allow students, including the student in question, to do private study when under their supervision.

40 There was no evidence that those other teachers had ever used "private study" as a way of abrogating their responsibility to deliver a course to a student as the principal evidently thought the applicant had.

41 Another assertion was the applicant had been treated unfairly because the principal of the school was biased against him. The applicant says that because of a difficult and confrontational past between him and the principal he was targeted and reports were made to head office about his conduct that would not have been made if that history had not existed.

42 I have no difficulty at all in accepting that there was a history of confrontation between the applicant and the principal. The principal stopping the applicant from being able to spend money on a school credit card was an example of a flashpoint in that history of conflict.

43 However, bias would only be relevant if it could demonstrate some real significance in relation to the finding of negligence against the applicant. The principal was not a decision maker and an appearance of bias would not be enough. There would have to be some act, proven on the part of the principal, that made a material difference to the finding against the applicant that he was negligent.

44 This might be something like setting an arbitrary and unilateral standard for the applicant and then asserting negligence for a failure to meet it, or pretending that something the applicant did, or did not do, was negligence when, in fact, other teachers did it, or did not do it, with impugnity.

45 The applicant, I think, says something like this occurred in relation to the instruction in the letter of 25 November 2016.

46 That instruction has however been put in its proper context above and it is not, to my mind, evidence of any arbitrary treatment of the applicant.

47 There is no evidence of the principal treating the applicant differently in an unfair way. There was no evidence at all that the principal had set the applicant up to fail by imposing an unfair requirement upon him or had treated him differently to others in an unfair way.

48 Ultimately, there was neglect on the part of the applicant in relation to the enrolment of a student and the teaching of a student. There is nothing arbitrary or unilateral about the requirements to do these things. They are not even set by the principal. They are fundamental requirements of being a teacher.

49 Finally, there was a general assertion that what happened to the applicant, both in terms of findings against him and penalty, was unfair because the applicant was being left to "carry the can" when others had a role in the failure to enrol and teach the student in question.

50 I have no hesitation at all in finding that the student in question was failed not only by the applicant but also by others.

51 The applicant had a history that had led the principal to write to the applicant in the terms she did on 25 November 2016. Yet in June 2017, and only by accident really, it was found that the applicant was doing effectively the same thing as that about which the principal had been concerned in November 2016. These were also concerns about which the Head of Learning in the relevant area had been aware, he having been present at the meeting that was referred to in the 25 November 2016 letter.

52 It was plainly not good enough for those further up the tree to allow the applicant to have a student in his class who, by June 2017, had not been enrolled in, and was receiving no instruction in, a course he had nominated and for which he had been timetabled.

53 None of this, in my view, diminishes the seriousness of the negligence of the applicant, especially given his experience and history. A failure to teach is just not good enough.

54 But those higher up the tree should really be examining whether they did enough to ensure the situation did not arise, given what they believed had happened in 2016.

55 The principal said that she was required to have "no level of oversight to ensure a teacher was doing their job appropriately". She went on to explain what she meant by this in that she had:

> … 63 teachers teaching in 63 different rooms at any one time. It would be almost impossible for me to check that effective teaching is happening in every single classroom and that those sorts of things like adhering to process is happening in every single classroom. It's why we have the Teacher Registration Board. It's why people need to actually treat their role as a professional and undertake their professional duties. (ts 149).

56 With the gloss the principal placed upon her first statement by the second, the first might be accepted, but the applicant was not just another teacher. He was a teacher in whom the principal had identified a weakness. She should have done something to ensure that deficiency was being addressed and that no student was being affected by it not being addressed.

57 The applicant's Head of Learning, said:

> I had no reason to believe that if the student was timetabled in SIS against that certificate, against that teacher, that that teacher wouldn't be working with that student on a daily basis, the student's appearing in their class five times a week, I had no reason to think that that teacher wouldn't be doing the job that I'm expecting them to do. (ts 188).

58 He also should have known better than to make such an assumption in relation to the applicant given what had happened in 2016.

59 However, whatever relevance such failures have, it will not be, and cannot be, to make the decision made in relation to the applicant unfair. His negligence is too great for that. It goes to the heart of being a teacher. That is, to be sufficiently interested in your students that they are enrolled in and being taught in a course they are coming to school to do.

60 In relation to the wrongdoing, it may have been enough to warrant dismissal on its own and without more. I say this because it seems to me, as I have said, that the negligence goes to the very heart of what this teacher was being paid taxpayer money to do.

61 A teacher should know whether a student is properly enrolled in a course when the teacher is delivering that course under an arrangement with a registered training organisation. A teacher should also give instruction to the student in that course.

62 It is not appropriate to say that so long as the student causes no trouble, or does other work, this is good enough. It is not. While Year 11 and 12 students are progressing toward adulthood

and should be given some latitude and responsibility, it goes too far to allow them to decide what to do in the way the applicant allowed.

63 It is also not good enough to come up with explanations to the effect, "it is an easy course and can be completed in a short period of time". The folly of this approach was shown up by this case. The applicant's assessment of the student was quite wrong. It was not an easy course for him at all and he was almost left with too little time to complete it. Ultimately he was placed in a special support class to do so.

64 So, as I say, this matter could have without more warranted dismissal.

65 In this case, however, there were four findings of misconduct on the applicant's record as follows:

- In February 2015, he committed a breach of discipline and was reprimanded and fined.
- In June 2015, he committed a breach of discipline and was reprimanded and fi ned.
- In May 2016, he committed a breach of discipline and was reprimanded and fined.
- In October 2016, he was found to have committed an act of misconduct and reprimanded.

66 Any question that the penalty was unfair is completely resolved by reference to these matters.

67 As I say, dismissal for this breach alone may have been warranted. I could not possibly find the applicant's employer, who is in charge of the delivery of education within the public system at massive taxpayers' expense was wrong, or unfair, in dismissing the applicant for this matter, given his past record.

68 The application is dismissed.