

REDACTED FINAL REPORT

Investigation pursuant to referral
Section 24(2)(a) *Independent Commissioner Against Corruption Act 2012*

Agency	Department for Communities and Social Inclusion
Ombudsman reference	2015/08880
ICAC reference	2015/000755
Date of referral	22 October 2015
Issues to be assessed	<p>1. Whether the agency committed maladministration in public administration by suspending a trainee in a manner contrary to legislative requirements</p> <p>2. Whether the agency committed maladministration in public administration by misusing public funds for a 12 month paid suspension with no attempt at investigation</p>

Jurisdiction

This matter was referred to the Ombudsman by the Independent Commissioner Against Corruption (**the Commissioner**) pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (**the ICAC Act**), as raising a potential issue of misconduct and maladministration in public administration within the meaning of that Act (**the referral**).

The referral arose out of a report to the Office for Public Integrity.

The referral gives rise to two issues.

Action taken

Using my powers under the *Ombudsman Act 1972* (**the Ombudsman Act**), I have conducted an investigation of the issues in response to the referral by:

- assessing the information provided by the Commissioner
- seeking a written response from the agency
- seeking further information from the agency
- considering:
 - the ICAC Act and the Ombudsman Act
 - the *Training and Skills Development Act 2008* (**the TSD Act**)
 - the *Public Sector Act 2009* (**the Public Sector Act**)
 - the Intellectual Disability Services Award (**the Award**)
- preparing a provisional report and providing it to the parties for comment

- seeking a response from the agency to issues raised by the Trainee in response to the provisional report
- providing a draft final report to the Commissioner for comment
- preparing this final report.

Standard of proof

The standard of proof I have applied in my investigation and this report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*), I have considered the nature of the complaint and the allegations made and the consequences if they were to be upheld. *Briginshaw* recognises that greater care is needed in considering the evidence in some cases;¹ and it is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report

The Trainee responded to my provisional report:

- disputing the agency's assertion that the delay in lodging an application with the Industrial Relations Commission (**the Commission**) was due to the fact that the agency was unaware of the fact that [the Trainee] was on a training contract
- stating that when the allegations were put to [the Trainee] at the meeting on 8 August 2014, [the Trainee] told [a Director] and [a Human Resources Consultant] that he was undertaking a Certificate 3 in Disability and queried whether he could continue his training
- noting that at that meeting both [a Director] and [a Human Resources Consultant] told [the Trainee] that he could not continue to undertake that training
- stating that he had asked [a Human Resources Consultant] for notes of the meeting and was told that no notes were taken
- providing a copy of notes taken by [the Trainee's] union representative who attend the meeting which relevantly stated:

[Union Representative] followed up with e/er, mbr [i.e. the Trainee] doing cert 3 and whether he should keep doing it. PW advised no. [Union Representative] clarified with mbr are e/ers apying [sic]? Yes, okay so they said no.

- noting that during the meeting it was mentioned to [a Director] that [the Trainee] was to start a training block the following week and he was told that he was not able to do it because it involved being around other employees
- querying the professionalism of the agency in failing to contact the Commission for 12 months
- providing a copy of his training contract that was signed by the Director Human Resources, and submitting that [a Human Resources Consultant] reported to [the Director].

The agency responded to my provisional report:

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- noting that the agency accepted my finding at paragraph 26 of my provisional report that the initial suspension did not result in maladministration but that the suspension was contrary to law and, on that basis, an administrative error for the purposes of section 25(1)(a) of the Ombudsman Act
- clarifying that the Human Resources Consultant responsible for [the Trainee's] file detected their oversight and took action accordingly before they left employment with the agency
- noting that while the agency does not dispute the administrative error arising from its delay in lodging its application with the Commission, it was not necessarily the case that the cost of paying [the Trainee] would have been substantially reduced had the matter been referred to the Commission in a timely manner
- asserting that while the Commissioner may perform functions in relation to any potential issue of corruption, misconduct or maladministration, it is intended that the primary objectives of the Commissioner be:
 - to investigate serious or systemic corruption in public administration; and
 - to refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the body or exercising the powers of the body as the Commissioner considers appropriate.
- referring to the definitions of 'serious' or 'systemic' maladministration in the Commissioner's Directions and Guidelines published under section 20 of the ICAC Act and additional information provided on ICAC's website
- asserting that none of the factors identified in the definitions of 'serious' or 'systemic' misconduct apply to the circumstances of this matter
- providing the following explanation of the agency's budget constraints:

The department aims to progress investigations into alleged misconduct of employees as soon as reasonably possible with specific timelines dependent upon the resources available. The department is a relatively large public sector agency with the primary purpose of providing services and building stronger communities for the citizens of South Australia. With an annual budget of \$1.2b, a full-time equivalent (FTE) workforce of 4, 469 as at 30 June 2015 and in an environment where savings must be achieved, you would appreciate that there are competing priorities for resources where the greatest need is in service delivery in the areas of disability, aged care, social housing and homelessness; affordable living programs; youth justice; domestic violence; problem gambling and disaster relief and recovery. There are occasions, such as the present case, where Human Resources consultants are managing large caseloads with many competing priorities.

- referring to the agency's previous response of 10 December 2015 in which the agency outlined the following circumstances which led to delay in investigating the matter and providing the [Trainee] with the allegations:
 - [the Trainee] was suspended almost immediately upon notification of the allegations with limited investigation undertaken prior to this decision being made (in many cases, where allegations are of a less serious nature or have less potential for direct impact on the welfare of a client, the investigation process might be well progressed before a decision is made to suspend an employee);
 - there was a change of HR consultants working on the investigation and a significant workload of HR consultants involving other investigations at that time. While the department is a relatively large agency investigations of this nature require experienced staff with appropriate skills;
 - legal advice was sought from the Crown Solicitor's Office in relation to the allegations to be put to [the Trainee] given the seriousness of the allegations and the complexity of the industrial matters. This advice took a period of 2 months to receive.

- noting that despite the timeframes stipulated in the TSD Act it is unrealistic to expect an investigation and subsequent disciplinary process into serious misconduct, that affords procedural fairness to the employee, will be finalised within five weeks
- noting that an investigation period of between 3-6 months (followed by a disciplinary process) would have been unreasonable in a matter of this complexity with potential for such significant consequences for the employee involved
- stating:
 - Even if the application had been made to the Industrial Relations Commission in a timely manner, it is likely that the employee would have continued to have been paid for a period of time much longer than the 5 weeks of suspension provided for in the TSD Act. While the Commission would have been required to exercise its powers under one of the sections in 65(2) of the TSD Act after that period of time, it is unlikely the matter would have been resolved on a final basis and the disciplinary matter including the suspension of [the Trainee's] employment on full pay would have likely continued for some time.
- noting that the issue was confined to a particular disciplinary matter handled by Human Resources which has not impacted upon a number of persons or the services or programs provided or funded by the department
- noting that the agency has taken necessary steps to avoid further recurrences of the error made in relation to the application of the TSD Act by educating staff and amending policies
- asserting that, for the reasons outlined by the agency, the threshold in section 5(4)(a)(ii) that alleged mismanagement of public resources must be 'significant'³ has not been met
- stating:

I accept the recommendations you have made on the final page of your provisional report in relation to amending the relevant Departmental procedures to specifically include the requirements of Sections 51 and 64 of the TSD Act. This has now been amended and a copy of the revised procedure is attached for your information. The department has already taken steps to educate Human Resources staff in relation to the requirements of the TSD Act to ensure this situation is not repeated. As previously advised the department has already restructured the Human Resources directorate so that investigations are now undertaken by a dedicated investigations team which will attempt to assist in expediting the process of investigations and disciplinary matters.

My investigation gave the agency an opportunity to respond to [the Trainee's] submission that the issue of him being on a training contract was raised at the meeting on 8 August 2014. I have included a summary of the agency's response in the body of my report.

I have considered the views of both [the Trainee] and the agency (including the further information provided by the agency) and my view remains as set out in my provisional report.

I specifically address the issues raised by those parties in the body of my report as necessary.

Background and evidence obtained in the investigation

1. [The Trainee] is employed by the Department for Communities and Social Inclusion (**the agency**) as a trainee working in Disability Services.
2. On 7 August 2014 a disability support worker (also employed by the agency) reported to a shift supervisor that two employees (one of which was alleged to be [the Trainee]) had been smoking marijuana and drinking on duty while supporting a client of Disability Services. The allegation was that this had occurred on many occasions.

³ Section 5(4)(a)(ii) refers to 'substantial' mismanagement of public resources.

3. On 8 August 2014 [the Trainee] met with [a Director], Director (South) Disability Services and [a Human Resources Consultant], Senior Human Resources Consultant of the agency. A representative of United Voice was also in attendance as [the Trainee's] support person. [A Director] advised [the Trainee] that he was suspended from duty with remuneration forthwith and until further notice.
4. On 11 August 2014 [a Director], on behalf of the agency, wrote to [the Trainee] confirming the outcome of the 8 August 2014 meeting. [A Director's] letter stated:

During the meeting you were advised that information has been received to warrant an investigation into suspicions that you consumed alcohol and drugs in the workplace.

You were advised that given the seriousness of the suspected conduct, it was my view to suspend you from duty with remuneration until further notice. I provided you with an opportunity at the meeting to submit to me why I should not act to suspend you from duty with remuneration.

As advised in the meeting, I confirm that effective immediately and until further notice, you are suspended from duty with remuneration pursuant to provision 4-1-7-3-1 of the SA Health (Health Care Act) Human Resources Manual (the HR Manual).

You are to comply with the following managerial directions while suspended:

- you are not to attend any workplace(s) of the Department;
- you are not to contact other employees during or outside of working hours with the exception of [...] or Human Resources;
- you are not to discuss the allegations against you or disciplinary process with any person apart from your spouse or partner, medical practitioner(s), counsellor(s), union or legal adviser(s) or otherwise as required by law; and
- you are to remain contactable during normal working hours and make yourself available to attend meetings as required.

Please contact [...], Senior HR Consultant on [...] should you require further information.

Enclosed is a copy of provision 4-1-7-3-1 of the HR Manual.

I remind you that the Department's Employee Assistance Program is available by contacting [...] on [...].

5. [The Trainee] has been suspended with pay since 8 August 2014.
6. On 26 August 2014 [a Director] wrote to [the Trainee] reminding him to comply with the managerial directions as set out in [a Director's] letter of 11 August 2014 while suspended.
7. According to the agency, the following steps were taken to investigate the allegations after [the Trainee's] suspension:

Following suspension of [the Trainee], a number of interviews were conducted with other staff and potential witnesses between the period 20 August 2014 and 18 May 2015. These were conducted to ascertain whether the allegations made could be further corroborated/supported by evidence.

A range of other documentation was examined and considered, during this time, in regard to assessing the extent to which allegations could be substantiated and accordingly put to the Trainee by way of formal allegations e.g.

- Alcohol Expenditure package including Personal Expenditure Records and receipts

- Timecard compare report - matching [the Trainee] and the other employees at [an address]

After finalisation of the investigation, on 29 June 2015 the Director Human Resources wrote to the Crown Solicitor's Office seeking assistance in settling the letter of allegations.

8. The agency lodged its section 64 application (**the application**) with the Commission on 26 July 2015, almost a year after [the Trainee's] suspension.
9. On 25 August 2015, over a year after the suspension, the agency provided [the Trainee] with a letter setting out the particulars of the allegations (**the August 2015 letter**). The August 2015 letter (which was signed by the Chief Executive of the agency) relevantly stated:

I suspect on reasonable grounds that you have committed misconduct and are thereby liable to disciplinary action. I intend to decide if you are in fact liable to disciplinary action. The bases for my suspicions are as follows:

[the letter then provided particulars of the allegations against [the Trainee]]

I hereby provide you with an opportunity to respond to the allegations set out in this correspondence. Any submission you wish to make must be in writing and received by me no later than close of business on 10 September 2015. Should you choose not to or fail to make a submission, I will make a decision as to whether the allegations against you are proven on the balance of probabilities based on information and advice available to me. Please send your submission marked private and confidential to me at:

Chief Executive's Office
Department for Communities and Social Inclusion
GPO Box 292
Adelaide SA 5001

In the event I find all or some of the allegations against you proven and I am minded to impose a disciplinary sanction(s) upon you, I will put you on notice as to any sanction(s) I intend to impose and afford you a reasonable opportunity to respond before making a final decision on that issue.

....

You remain suspended from duty with remuneration until further notice. The managerial directions previously issued to you in the meeting of 8 August 2014 and confirmed in a letter dated 11 August 2014 remain in force. Those directions are:

- you are not to attend any workplace(s) of the Department;
- you are not to contact other employees during or outside of working hours with the exception of [a department officer] or Human Resources;
- you are not to discuss the allegations against you or disciplinary process with any person apart from your spouse or partner, medical practitioner(s), counselor(s), union or legal adviser(s) or otherwise as required by law; and
- you are to remain contactable during normal working hours and make yourself available to attend meetings as required.

I must warn that should you contravene or fail to comply with my directions, you may be liable to disciplinary action.

10. The agency provided my investigation with the following reasons for the delays:
 1. The initial decision to suspend [the Trainee] was made primarily with the client's welfare in mind. As a result, limited investigation was undertaken prior to the

decision to suspend, meaning that the settling of the allegations to be put took longer.

2. There was a change of HR Consultants working on the investigation during the period, and a significant workload involving other investigations with competing priorities.
 3. The advice sought from the Crown Solicitor's Office added a further two months to the issuing of the allegations.
11. The agency's investigation was initially assigned to a Human Resources consultant in the agency. That person's employment with the agency ceased in July 2015.
 12. The agency has acknowledged that it did not immediately refer the matter to the Commission as required by section 64(8) of the TSD Act. The agency told my investigation that the relevant Human Resources consultant was unaware that [the Trainee] was on a training contract at the time of his suspension. The agency stated that once it became aware that [the Trainee] was subject to a training contract, it 'immediately' lodged the application.
 13. According to the agency, [the Trainee] lodged a grievance under section 65 of the TSD Act and:

The matter has been subject to a number of conciliation conferences, in which the Department has been assisted by the Crown Solicitor's Office, on the basis that there are unresolved questions of law.

Relevant law/policies

14. Section 5(4) of the ICAC Act provides:
 - (4) *Maladministration in public administration*—
 - (a) means—
 - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
 - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
 - (b) includes conduct resulting from impropriety, incompetence or negligence; and
 - (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

15. Section 51 of the TSD Act provides:

Termination or suspension of training contract

- (1) Subject to this Part, no person, other than the Commission, may terminate or suspend, or purport to terminate or suspend, a training contract.

Maximum penalty: \$5 000.

Expiation fee: \$315.

- (2) Subject to this Part, the Commission may, on application or of its own motion, terminate or suspend a training contract.

- (3) An application for termination or suspension of a training contract must be made to the Commission in the manner and form approved by the Commission.
- (4) An applicant must provide the Commission with any information required by the Commission for the purposes of determining the application.
- (5) The Commission must specify the date on which the training contract will terminate or be suspended or will be taken to have been terminated or suspended.
- (6) A party to a training contract may, after the commencement of the term of the contract and within the probationary period, terminate the contract by written notice to the other party or parties to the contract.
- (7) If a training contract is terminated during the probationary period, the employer under the contract must, within 7 days of the termination, notify the Commission in writing of the termination.

Maximum penalty: \$5 000.

Expiation fee: \$315.

16. Section 64 of the TSD Act provides:

Employer may suspend apprentice/trainee for serious misconduct

- (1) If an employer has reasonable grounds to believe that an apprentice/trainee employed by the employer is guilty of wilful and serious misconduct, the employer may (without first obtaining the approval of the Commission) suspend the apprentice/trainee from employment and must, in that event—
 - (a) immediately refer the matter to the Industrial Relations Commission; and
 - (b) within 3 days of the suspension—confirm the reference in writing.

Maximum penalty: \$5 000.

Expiation fee: \$315.

- (2) A suspension under this section must, unless confirmed or extended by the Industrial Relations Commission under section 65, not operate for more than 7 working days.

17. Provision 4-1-7-3-1 of the SA Health (Health Care Act) Human Resources Manual (**the HR Manual**) provides:

4-1-7-3-1 Suspension with pay

Management may consider suspending an employee from duty with pay in circumstances where there are suspicions or allegation(s) of serious misconduct against the employee. In addition to allegations of serious misconduct, other relevant considerations to suspending an employee from duty with pay include:

- where there is a risk that the employee will destroy evidence or collude with other employees;
- any risk to the health, safety and welfare of employees; and
- the reputation of the health service, Department and Government.

Management should always consider if it is viable for employees to perform alternate duties and/or the same duties from another location, including from home, as an alternate to suspension.

18. Section 57 of the Public Sector Act provides:

57 - Power to suspend from duty

- (1) A public sector agency may suspend an employee of the agency from duty pending the completion of any investigation, process or proceedings in respect of alleged misconduct by the employee if the agency decides that it is in the public or agency's interest to do so.
- (2) Subject to subsection (3), a suspension will be with remuneration.
- (3) A suspension may be without remuneration if—
 - (a) the employee has been charged with an offence punishable by imprisonment;
 - or
 - (b) the employee has been given notice setting out details of alleged misconduct on the part of the employee and inviting the employee to show cause why disciplinary action should not be taken against the employee.
- (4) A public sector agency must reimburse remuneration withheld as a result of the suspension of an employee from duty if a court finds the person not guilty of the offence or the agency decides that the person was not guilty of misconduct (or both if the employee has been both charged with the offence and given notice setting out details of alleged misconduct).
- (5) A public sector agency may revoke a suspension at any time.

19. Section 25 of the Ombudsman Act provides:

25—Proceedings on the completion of an investigation

- (1) This section applies to any investigation conducted by the Ombudsman as a result of which the Ombudsman is of the opinion that the administrative act to which the investigation relates—
 - (a) appears to have been made contrary to law; or
 - (b) was unreasonable, unjust, oppressive or improperly discriminatory; or
 - (c) was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
 - (d) was done in the exercise of a power or discretion and was so done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations; or
 - (e) was done in the exercise of a power or discretion and the reasons for the act were not but should have been given; or
 - (f) was based wholly or in part on a mistake of law or fact; or
 - (g) was wrong.
- (1a) This section does not apply to an investigation conducted under section 14.
- (2) In the case of an investigation to which this section applies in which the Ombudsman is of the opinion—
 - (a) that the subject matter of the investigation should be referred back to the appropriate agency for further consideration; or

- (b) that action can be, and should be, taken to rectify, or mitigate or alter the effects of, the administrative act to which the investigation related; or
- (c) that the practice in accordance with which the administrative act was done should be varied; or
- (d) that any law in accordance with which or on the basis of which the action was taken should be amended or repealed; or
- (e) that the reason for any administrative act should be given; or
- (f) that any other steps should be taken,

the Ombudsman must report that opinion and the reasons for it to the principal officer of the relevant agency and may make such recommendations as the Ombudsman thinks fit.

- (3) The Ombudsman must send a copy of any report or recommendation made under subsection (2) to the responsible Minister and, in the case of a report or recommendation relating to the sheriff, to the State Courts Administration Council.
- (4) The principal officer of an agency in relation to which a recommendation is made under subsection (2) must, at the request of the Ombudsman, report to the Ombudsman within a time allowed in the request on what steps have been taken to give effect to the recommendation and, if no such steps have been taken, the reason for the inaction.
- (5) If it appears to the Ombudsman that appropriate steps have not been taken to give effect to a recommendation made under this section, the Ombudsman may make a report on the matter (containing a copy of the earlier report and the recommendation) to the Premier.

Where the Ombudsman reports to the Premier under subsection (5), the Ombudsman may forward copies of the report to the Speaker of the House of Assembly and the President of the Legislative Council with a request that they be laid before their respective Houses.

Preliminary comments

- 20. It is important to note at the outset that it is not my role to investigate the substantive allegations against [the Trainee] or the employment issues between the agency and [the Trainee].
- 21. Instead, the focus of my investigation has been the practice of the agency in suspending [the Trainee] (including whether that practice was consistent with legislative requirements) and whether there was a substantial misuse of public funds resulting from the 12 month paid suspension.
- 22. I note also that the referral from the Commissioner was in relation to the agency itself rather than individual officers and I have approached the matter on that basis.

Whether the agency committed maladministration in public administration by suspending a trainee in a manner contrary to legislative requirements

- 23. The agency has acknowledged that its suspension of [the Trainee] was not undertaken in accordance with section 64 of the TSD Act. It is clear that the matter was not referred to the Commission immediately as required by section 64.
- 24. I have noted the agency's explanation that the relevant Human Resources Consultant was not aware that [the Trainee] was on a training contract and that this oversight was ultimately detected and action taken accordingly before the consultant left the agency.

25. [The Trainee] has disputed the fact that the relevant Human Resources Consultant was unaware that he was on a training contract. According to [the Trainee]:

- when the allegations were put to [the Trainee] at the meeting on 8 August 2014 he told [a Director] and [a Human Resources Consultant] that he was undertaking a Certificate 3 in Disability and queried whether he could continue that training
- [the Director] signed his training contract and [the Human Resources Consultant] reported to [the Director].

[The Trainee] provided a copy of notes taken by his union representative who attended the meeting which relevantly stated:

[Union Representative] followed up with e/er, mbr [i.e. the Trainee] doing cert 3 and whether he should keep doing it. [a Director] advised no. [Union Representative] clarified with mbr are e/ers apying [sic]? Yes, okay so they said no.

26. While the issue of when the Human Resources Consultant became aware of the training contract does not impact on my ultimate findings, it was relevant to the seriousness of the alleged conduct. In those circumstances, my investigation gave the agency an opportunity to respond on that discrete issue after the provisional report was provided to the parties.

27. The agency responded as follows:

- the discussion that took place at the 8 August 2014 meeting was the subject of witness statements and extensive cross examination in the Industrial Relations Commission on 9 March 2016
- during the hearing in the Industrial Relations Commission, the agency submitted statements from [a Director] and [the Human Resources Consultant] that both state that during the meeting on 8 August 2014, there was no reference made to [the Trainee] being on a contract of training by either [the Trainee] or his union representative
- in giving evidence, [the Trainee's] union representative was not able to recall whether [the Trainee] being on a training contract was specifically raised
- while the agency accepts that it is likely that [the Trainee] undertaking a Certificate 3 in Disability was raised at the meeting, it is apparent that both the union representative and the agency were under the impression that [the Trainee] had not yet commenced but was due to begin that study in the near future
- that view was confirmed in an email from the union representative to [a Director] which relevantly states:

[the Trainee] [sic] advises us that he was due to start a Certificate III in Disability Services next week

- there are no written records to confirm that [the Trainee] being subject to a training contract was discussed at the 8 August 2014 meeting or in subsequent correspondence
- had the agency been advised of the existence of the contract of training at the meeting or immediately following the meeting, it would have taken immediate corrective action
- while many new agency employees undertake the Certificate 3 in Disability, very few of them do so under a contract of training
- the relevant training provider stopped providing contracts of training altogether in late 2013 (i.e. before the Trainee's suspension) but continue to undertake accredited training including the Certificate 3 in Disability

- it does not necessarily follow, therefore, that an individual believed to be due to commence the Certificate 3 in the near future would be undertaking that training subject to a current contract of training
 - it is understood that [the Trainee] did not actively participate in modules of the Certificate 3 but attended seven days of “off the job” training
 - as previously stated, the agency remains firmly of the view that at the time of his suspension, the relevant Human Resources Consultant was not aware that [the Trainee] was subject to a training contract
 - notwithstanding the agency’s lack of knowledge at the time, the agency acknowledges that it should have been aware of the training contract
 - upon discovering the error, the Human Resources Consultant contacted the Commission
 - the agency has changed its procedures since
 - [the Human Resources Consultant] reported directly to another staff member, not [the Director]
 - Regarding [the Director] signing the contract, at the time, the relevant training provider signed such contracts and forwarded them to [the Director] who signed them on behalf of the agency; on reflection, it would be more appropriate for the relevant business unit to sign such contracts.
28. I am satisfied that the issue of [the Trainee’s] Certificate 3 was raised at the meeting on 8 August 2014. I accept, however, as submitted by the agency, that that does not necessarily decide the matter. I have given careful consideration to the detailed submissions of the agency. I have also noted the absence of any written confirmation that the issue of [the Trainee’s] training contract was specifically discussed at the meeting. In all of the circumstances, I do not consider that the evidence before me demonstrates that the agency was made aware of the training contract at the 8 August 2014 meeting.
29. In this instance, to be satisfied that the definition of maladministration has been met, I would need to be satisfied that the practice of the agency in suspending [the Trainee] resulted in substantial mismanagement of public resources.
30. I do not consider that the initial suspension (including the fact that the suspension was contrary to law) in itself resulted in substantial mismanagement of public resources.

Opinion

31. The fact that [the Trainee’s] suspension was contrary to legislative requirements did not, without more, result in maladministration for the purposes of section 5(4) of the ICAC Act.
32. I consider, however, that the fact that the suspension was contrary to law resulted in an administrative error for the purposes of section 25(1)(a) of the Ombudsman Act.

Whether the agency committed maladministration in public administration by misusing public funds for a 12 month paid suspension with no attempt at investigation

33. I do not consider that the agency made ‘no’ attempt at investigation. I consider, however, that the agency’s failure to investigate the matter in a timely manner was not appropriate practice.
34. The agency told my investigation that:

..a number of interviews were conducted with other staff and potential witnesses between the period 20 August 2014 and 18 May 2015. These were conducted to

ascertain whether the allegations made could be further corroborated/supported by evidence.

35. According to the agency's investigation file, with the exception of one statement which was taken in October 2014, all other statements were taken in the period from May to November 2015. That is, the majority of the statements were taken at least nine months after the Trainee was notified of the suspension.
36. The agency initially provided the following explanation for the delay:
1. The initial decision to suspend [the Trainee] was made primarily with the client's welfare in mind. As a result, limited investigation was undertaken prior to the decision to suspend, meaning that the settling of the allegations to be put took longer.
 2. There was a change of HR Consultants working on the investigation during the period, and a significant workload involving other investigations with competing priorities.
 3. The advice sought from the Crown Solicitor's Office added a further two months to the issuing of the allegations.
37. My investigation sought further detail of the change of Human Resources consultants working on the investigation, the nature of the Department's competing priorities and why those competing priorities impacted on the investigation of the allegations against [the Trainee].
38. The agency told my investigation that the Human Resources consultant who was initially assigned the investigation was at the relevant time undertaking a number of other investigations as well as their normal Human Resources operations portfolio. The agency stated:
- The Department acknowledges that prior to July 2015, investigations were not optimally managed, as HR Consultants had competing portfolio priorities.
- Over time, the volume of investigations/disciplinary processes increased. In recognising this and a number of other factors, the Department undertook a restructure of the Human Resources Directorate. The restructure resulted in an investigations team being formed and transferring the majority of investigations away from generalist HR consultants to a dedicated Investigation Team.
- As part of this process, all investigations were reviewed in detail and some flaws in [the Trainee's] matter were discovered by [the] Senior Employee Relations/Compliance Officer. [The Trainee] received a letter of allegations in August 2015. The Senior Employee Relations/Compliance Officer subsequently discovered a number of flaws in the investigation that were able to be corrected.
39. I have noted the agency's explanation for its decision to pay [the Trainee] for 12 months:
1. The decision to pay employees who are suspended as a consequence of a misconduct investigation is not one within the Department's ability to make, i.e. it is determined by mandated industrial processes.
 2. Those same processes determine that employers must carry out investigations and disciplinary processes in a way that is procedurally fair. The steps involved in establishing procedural fairness of necessity elongate the process, especially where serious and willful misconduct is involved and termination of employment is a potential consequence.
 3. This particular matter was complicated by [the Trainee's] training contract involved - this added a layer of complexity that ordinarily would not be experienced in a misconduct investigation if the employee were simply employed under a contract of employment.

4. As to whether it is reasonable to have an employee suspended for longer than 12 months, in disability settings the Department has a clear bias towards protecting the needs and interests of disability clients. This at times raises hardships regarding the needs and interests of suspended employees and the Department itself; however, this cannot always be easily remedied.

40. The agency has also referred to Clause 4-1-7-3-1 of the HR Manual which provides:

4-1-7-3-1 Suspension with pay

Management may consider suspending an employee from duty with pay in circumstances where there are suspicions or allegation(s) of serious misconduct against the employee. In addition to allegations of serious misconduct, other relevant considerations to suspending an employee from duty with pay include:

- where there is a risk that the employee will destroy evidence or collude with other employees;
- any risk to the health, safety and welfare of employees; and
- the reputation of the health service, Department and Government.

41. While I do not question the agency's initial decision to place [the Trainee] on suspension with pay, I consider that the delay of almost a year before the application was lodged, and the further delay before allegations were provided to [the Trainee], meant that the agency's practice has resulted in substantial mismanagement of public resources. I understand that at the date of writing [the Trainee] continues to be paid by the agency, although he has not yet returned to work. In my view, the cost of paying [the Trainee] for over a year and a half while he has not been working would have been substantially reduced if the matter had been immediately referred to the Commission as required by section 64 of the TSD Act.

42. I have considered the agency's submissions in response to my provisional report as set out under the heading 'Response to my provisional report'. It is not necessary for me to repeat those submissions here. Having considered those submissions, my view remains as set out in my provisional report. In that regard, I note:

- while I have noted the agency's comments about whether or not the conduct was 'serious' or 'systemic' maladministration for the purposes of the primary objects of the ICAC Act, I have jurisdiction to make a finding in relation to any misconduct or maladministration that meets the definitions in section 5 of the ICAC Act
- while I accept that [the Trainee] may have continued to have been paid for a period longer than five weeks even once the matter was before the Commission, my view remains that the period for which he has been paid would have been considerably shortened had the matter been lodged with the Commission immediately as required.

43. The agency's initial response to my investigation included:

The Department has subsequently amended the procedure Human Resources Consultants utilise when suspending an employee, which includes a check as to whether an employee is subject to training contract.

44. My investigation sought a copy of that amended procedure and was provided with a draft document entitled 'Suspension of Contracts of Training' (**the Draft Training Contracts Procedure**). As the Draft Training Contracts Procedure did not include any reference to a check as to whether an employee is subject to a training contract, I sought further clarification from the agency. The agency provided a copy of another procedure entitled 'Human Resources Internal Procedure: Discipline' (**the Discipline Procedure**) and responded:

The Human Resources Directorate has a number of different procedures and processes which intersect when considering suspension of an employee. The two main documents that apply are: Human Resources Internal Procedure: Discipline and Human Resources Internal Procedure: Training Contracts.

Please note that the Department previously provided the Human Resources Internal Procedure: Training Contracts.

The Internal Procedures have been developed to guide and assist DCSI Human Resources Consultants to comply with legislative requirements or government policy. Human Resources Consultants are expected to follow the detail set out in the Human Resources Internal Procedure: Discipline and utilise associated documents, which include template letters, witness statements and other such documents. Page 8 of this procedure states:

“Ensure before any suspension is actioned that you check whether the employee is currently on a contract of training. The register for Employees with a Current Contract of Training is saved in Objective. If the employee is on a contract of training, please refer to the relevant internal HR procedure and inform the Director Human Resources before taking any further action....” (Attachment 1).

The document previously provided to you is the internal procedure document (Human Resources Internal Procedure: Training Contracts) that the Human Resources Internal Procedure: Discipline document relates to. It is the expectation of the Department that Human Resources Consultants would reference both internal procedure documents as well as all associated documentation and advise the Director Human Resources prior to undertaking any action.

45. The Draft Training Contracts Procedure relevantly stated:

Where a Trainee is considered to have unsatisfactory performance and/or [sic] subject to disciplinary issues Human Resources (HR) must be contacted immediately for further advice. To ensure that all parties are aware of their rights and obligations, advice from the Training and Skills Commission should also be sought in this instance. HR will seek advice on behalf of the DFC.

....

The final decision to approve a suspension lies with the Training and Skills Commission and through delegation by an appropriate Traineeship and Apprenticeship Management officer.

46. The Discipline Procedure included the following general statement about timeliness:

It is imperative that managers address suspected misconduct on the part of employees in a timely manner. A failure to do so is not only negligent on the part of management but can lead to arguments by employees that their conduct has been condoned.

It is also crucial that the managers promptly report to Human Resources any matters to be investigated through the disciplinary process.

47. In my provisional report, I acknowledged that both procedures required that suspension of a training contract be referred to the Director of Human Resources (who it may be presumed would be aware of the agency’s obligations under the TSD Act). That said, in my view, it was concerning that the agency’s legal obligations under the TSD were not made clear in either the draft Training Contracts Procedure or the Discipline Procedure. In particular, neither of those procedures specifically referred to the requirements (including the mandatory timeframes) of section 64 of the TSD Act. Nor did they emphasise the importance of providing a suspended person with the allegations against them in a timely manner.

48. In response to my provisional report, the agency provided my investigation with a document entitled 'Human Resources - Instruction - Suspension of Contracts of Training' (**the Human Resources Instruction**).
49. In my view, and subject to one issue addressed in my 'Recommendations and final comments', that document addresses the issues raised in my provisional report in relation to the Draft Training Contracts Procedure and the Discipline Procedure and the proposed recommendations in my provisional report. I commend the agency's timely response to the issues raised in my provisional report.

Opinion

50. I consider that:
- the fact that [the Trainee] was on paid suspension for 12 months before an application was lodged with the Commission or the allegations were provided to him resulted in maladministration for the purposes of section 5(4)(a)(i) of the ICAC Act.
 - the delay in investigating the allegations against [the Trainee] was unreasonable, resulting in an administrative error for the purposes of section 25(1)(b) of the Ombudsman Act
 - the delay in providing the allegations to [the Trainee] was unreasonable, resulting in an administrative error for the purposes of section 25(1)(b) of the Ombudsman Act.

Conclusion

51. In light of the above, I consider that the agency committed:
- maladministration in public administration within the meaning of section 5(4)(a)(i) of the ICAC Act
 - administrative error for the purposes of subsections 25(1)(a) and (b) of Ombudsman Act.

Recommendations and final comments

I acknowledge that the agency has taken steps to restructure its Human Resources Directorate and that investigations are now undertaken by a dedicated investigations team. I accept that this may go some way to addressing the types of issues that have arisen in this matter.

My provisional report foreshadowed making recommendations under section 25(2) of the Ombudsman Act that the agency amend its internal procedures to:

- specifically include the requirements of sections 51 and 64 of the TSD Act, in particular, to make clear that:
 - subject to Part 4 of the TSD Act, only the Commission may terminate or suspend or purport to terminate or suspend, a training contract
 - while the agency may suspend an apprentice or trainee from employment (without first obtaining the approval of the Commission) if the agency has reasonable grounds to believe that an apprentice or trainee is guilty of wilful and serious misconduct, in that event, the agency must:
 - immediately refer the matter to the Commission; and
 - within three days of the suspension, confirm it in writing
 - a suspension under section 64 of the TSD Act must, unless confirmed or extended by the Commission under section 65 of the TSD Act, not operate for more than seven working days

- where a trainee or apprentice has not been provided with the allegations against them before any suspension on the basis of wilful and serious misconduct, those allegations must be provided to the trainee or apprentice as soon as practicable after suspension has occurred.

I acknowledge that the agency took significant steps to implement those recommendations in response to my provisional report and before my final report was issued.

I note that Human Resources Instruction states at clause 22:

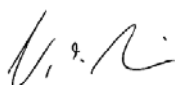
Where there are reasonable grounds to believe that an apprentice/trainee is guilty of willful and serious misconduct, DCSI may (without first obtaining approval from the Commission) suspend the apprentice/trainee from employment. However, the matter must be immediately referred to the Commission within **three days** of the suspension in accordance with section 64 of the *Training and Skills Development Act 2008 (SA)*.

In my view, it would be more accurate to state:

Where there are reasonable grounds to believe that an apprentice/trainee is guilty of willful and serious misconduct, DCSI may (without first obtaining approval from the Commission) suspend the apprentice/trainee from employment. However, the matter must be immediately referred to the Commission **and the reference confirmed in writing** within **three days** of the suspension in accordance with section 64 of the *Training and Skills Development Act 2008 (SA)* [my emphasis].

My only recommendation is that the Human Resources Instruction be amended accordingly.

In accordance with section 25(4) of the Ombudsman Act, I request that the agency report to me by 10 June 2016 on what steps have been taken to give effect to my recommendation above; and if no such steps have been taken, the reason(s) for the inaction.



Wayne Lines
SA OMBUDSMAN

11 May 2016