

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 8  
5619335

BETWEEN PEGGY BURROWS  
Applicant  
  
AND THE COMMISSIONER OF  
RANGIORA HIGH SCHOOL  
Respondent

Member of Authority: Vicki Campbell  
  
Representatives: Richard Harrison for Applicant  
Anne Toohey for Respondent  
  
Investigation Meeting: 12, 13, 14, 15, 16, 19 and 20 September 2016  
  
Submissions Received: 4 October 2016 from Applicant  
21 October 2016 from Respondent  
  
Determination: 12 January 2017

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. One or more conditions of Ms Burrows' employment was affected to her disadvantage by an unjustified action of her employer and she was unjustifiably dismissed from her employment.**
- B. Ms Burrows' application for reinstatement is declined.**
- C. The Commissioner is to pay to Ms Burrows a sum equivalent to eight months' lost remuneration under section 123(1)(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

**D. The Commissioner is to pay to Ms Burrows the sum of \$20,000 under section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

**E. Costs are reserved.**

**Employment relationship problem**

[1] Ms Peggy Burrows claims one or more conditions of her employment were affected to her disadvantage by unjustified actions of Beverley Moore, Commissioner (“the Commissioner”) of Rangiora High School (“the School”) and that she was unjustifiably dismissed. The Commissioner denies the claims.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Burrows and the Commissioner but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

**Non publication orders**

[3] On 21 June 2016 I issued a preliminary determination<sup>1</sup> making temporary non-publication orders in respect to the pleadings, evidence of all witnesses, including the names of those who were to give evidence, and all documents relied on by the witnesses.

[4] The non-publication orders were effective from 21 June 2016 until the date of my determination on the merits of Ms Burrows’ claims.

[5] The non-publication orders are cancelled with the issue of this determination and will no longer apply.

**Background**

[6] Ms Burrows was the Principal of the School from 2003 until 7 March 2016. The terms and conditions of Ms Burrows’ employment were set out in the Secondary Principals’ Collective Agreement 2013-2016 (“the collective agreement”).

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<sup>1</sup> [2016] NZERA Christchurch 93.

[7] A school Principal is the professional leader of a school's teaching staff. Ms Burrows is a registered teacher and subject to the statutory obligations and responsibilities of a registered teacher. Ms Burrows' dismissal was, as required, reported to the New Zealand Teachers Council. At the time of hearing, no decision affecting Ms Burrows' registration had been given.

***Rangiora High School assets***

[8] Since 1910 the School has had a school farm for the purpose of supporting agricultural instruction for students. In 2007 a portion of the farm land was sold and the proceeds (\$7,700,000) were held in trust and used for school-related purposes. Some of the funds were invested which saw the School's cash reserves increase to \$12,000,000 plus. Approximately \$10,000,000 is invested in call accounts and term deposits with trading banks.

[9] At the time of my investigation into Ms Burrows' claims other assets owned by the School included:

- a) A small farm;
- b) A property occupied and leased to the Rangiora High School Nursery; and
- c) Two residential properties.

[10] A legal opinion was obtained in May 2007 ("first opinion") from the School's lawyers Wynn Williams & Co which advised the School's Board of Trustees (the Board) that the proceeds from the sale of the farm lands should be "*expended in the purchase of other land ... to be held for the same purposes on which the land sold was held*", meaning the Board should seek to purchase further farm land with all or part of the sale proceeds.

[11] In July 2014 ("second opinion") the Ministry of Education ("the Ministry") advised the Board it was not required to apply the proceeds of the sale of the farm land to new farm land, rather the funds should be applied in a suitable manner to generate income for the benefit of the School's schooling operations.

[12] In his Finance Specialist Advisor report dated February 2015, Mr Michael Rondel noted that this contradictory advice had contributed to differences of opinion within the Board as to how the funds should be applied.

[13] In 2011 three board members sought to have the Board buy a farm from a relative of one of the board members for \$4,200,000 (the Board member concerned had stepped aside from any decisions regarding the proposed purchase). Ms Burrows challenged the proposal which brought her into conflict with the three members of the board. Tensions between the Board and Ms Burrows, particularly the three members of the Board she had challenged, escalated.

### ***Ms Burrows' Relationship with the Board***

[14] In May 2014, New Zealand School Trustees Association ("NZSTA") and the Board alerted the Ministry to a breakdown in the relationship between the Principal and the Board. The Chairman had stood down and the Board had struggled to find another trustee willing to take on the role.

[15] In June 2014, the Ministry provided the Board with funding for the Board to contract an experienced governance trainer/facilitator to assist the Board to work through its issues. The Board did not pursue any of the recommendations of the independent facilitator and discontinued working with him.

[16] In September 2014, the Board contracted another experienced facilitator to deliver two strategic planning workshops. While a draft plan was developed this plan was not pursued or further developed.

[17] In late 2014, three members of the board resigned and new board members were elected by the school's community. The members who resigned included the then Chairman of the Board. Ms Burrows has described her relationship with these three members of the Board as "*hostile*".

### ***Appointment of specialist advisors***

[18] In November 2014, the outgoing board sought a low level intervention from the Ministry. The intervention was for the engagement of specialist help. In November 2014, on the direction of the Ministry, two specialist advisers were appointed to provide specialist help to address risks to the operation of the school in

the areas of employment, communication and finance. The two advisers were Ms Beverly Moore and Mr Rondel.

[19] Ms Moore was appointed to report on the level and scope of risk associated with the Board's employment practices and Mr Rondel on the level and scope of risk in the area of finance.

#### Ms Moore

[20] The scope and obligations of Ms Moore as a contractor to the Board were set out in a written agreement dated 10 December 2014.

[21] The services to be provided by Ms Moore were set out in the first schedule to the agreement and included the provision of advice to the Board on the following governance matters relating to the Board's role as a good employer:

- The Board review their Policy framework defining Governance roles and responsibilities and their relationship between the Board and the Principal as the CEO
- The appropriate process for the Board, as the employer, to review their delegations to the Principal giving consideration to accepted best practice
- The role and responsibility of the Board, as the employer, in performance management of the Principal
- Strategies to strengthen consultation with staff, students and wider community to support a positive culture for learning
- To advise and assist where appropriate the Board's review of their communication with stakeholders
- To provide advice to the Board on how to build Trustee and Board capability including the development of effective succession planning

[22] The agreement required Ms Moore to provide a scoping report to the Board. In her undated report Ms Moore found:

The fundamental issue impacting on the leadership function at [Rangiora High School] was how the Board and the Principal differed in their views regarding the scope of their respective authority and roles. The lack of a shared understanding and key Governance policies clearly defining Governance and management at [Rangiora High School], has significantly contributed to the breakdown in relationships between the Board and the Principal.

[23] The report was highly critical of Ms Burrows' management and her relationships with the Board while at the same time Ms Moore acknowledged that

good things were happening for students and Ms Burrows was regarded by the majority of those she had interviewed as very hard working and dedicated.

[24] In her report Ms Moore recommended that the Board urgently instigate an independent investigation into the following:

- How the Principal manages employment issues on behalf of the Board as the employer, including allegations of workplace bullying.
- The Principal's communication with the Board, within the school and with the wider Rangiora Community.
- Allegations that documentation supplied to [the Ministry] on the Board's behalf by the Principal could be regarded as inaccurately representing student achievement levels at the school.
- That Board documents have been submitted to [the Ministry] without following appropriate processes.

[25] Ms Moore also recommended the Board use best practice examples developed by the NZSTA and the Ministry to inform their review of their governance model and policy framework. She recommended the Board give priority to implementing policies that determine the role of the Board and provide clear expectations of key relationships.

[26] Ms Moore recommended that the 2014 delegations policy be reviewed by the Board after taking into account advice received from NZSTA. A number of issues were raised by Ms Moore in respect of the delegations passed to the Principal by the Board. Ms Moore stressed the importance of maintaining delegations at a level that allowed the Principal to operate the school on a day to day basis but anything over and above that should be the responsibility of the Board.

[27] By way of example, the 2014 delegations policy allowed the Principal to

- a) engage contractors to the value of \$300,000 per individual project;
- b) authorise expenditure up to the value of \$600,000;
- c) following a Board resolution, apply for funding, sponsorship or other monies up to a value of \$1,000,000; and

- (a) gave the Principal significant authority over the assets of the school including the farm and the farm lands funds management.

Mr Rondel

[28] Mr Rondel was requested to undertake a review of the following areas:

- a) review the financial delegations and advise the Board on options, best practice and the process to be followed for any considered changes;
- b) advise the Board on finance reporting and processes; and
- c) review all entities, assets and liabilities of the Board to ensure they are effectively managed to support the schools strategic direction for teaching and learning.

[29] Mr Rondel completed his report in February 2015. He found the overall level of immediate risk to the School in the area of finance was low but identified significant medium and long term implications if actions were not taken. Mr Rondel recommended that matters identified in his report should be addressed in a timely manner.

[30] Mr Rondel noted that the value of some delegations were relatively higher than other schools. In particular he considered the value attributed to the engagement of contractors of \$300,000 was a high value and the authorised expenditure of \$600,000 was an excessive amount, higher than would be considered best practice.

[31] Mr Rondel acknowledged the need to have delegations at an appropriate level to allow the Principal to effectively manage the School but noted the need to ensure the Board was involved at an appropriate level in the contracting of providers to the School.

[32] Mr Rondel recorded that the school had budgeted and incurred substantial operating deficits when compared to the operational funding it had received. These deficits had been funded through the use of interest earned on the farm lands money. The extent of that funding had amounted to \$1.3m over 4 years which Mr Rondel found surprising. The additional spending had not been clearly defined and had not

been attributed to specific programs or activities. There was no clear analysis of what the additional funding was being used for and what additional outcomes the Board was expecting from spending the money.

[33] In his report Mr Rondel referred to the Rangiora High School Education Trust which was set up in 2006 with the purpose of protecting, preserving and growing the asset wealth of the School. Ms Annabel Sheppard of Wynn Williams & Co undertook a review of the Trust in 2014 and made recommendations. Mr Rondel was of the opinion that the review appeared robust and appropriate and notes that the findings of the review were reported to the Board in March 2014 but the recommendations were not implemented.

[34] Among other things Mr Rondel recommended the Board:

- a) Review the Principal's financial delegations, in particular the dollar amounts with clear rationale given for agreed levels.
- b) Develop a balanced "breakeven" budget based upon the operational funding and income it expects to receive for the year and that a clear business case with measurable outcomes be developed when reliance is to be placed on funding received from the interest income.
- c) Consider the development of a long term strategic plan in consultation with the school community and develop a financial and investment strategy that will support it.
- d) Make a determination regarding the most appropriate application of the proceeds of the sale of the farm lands that will assist with meeting the financial strategy.
- e) Reconsider the recommendations arising from the 2014 review of the Rangiora High School Education Trust once the strategy has been completed.

### ***The appointment of the Commissioner***

[35] On 11 February 2015 in a confidential report written by the Ministry, the Minister for Education ("the Minister") was requested to direct the Secretary for

Education to dissolve the Board of the School and appoint a Commissioner. On 16 February 2015 the Ministry appointed a Commissioner under section 78N(2) of the Education Act 1989 (“the intervention”). The effect of the appointment was to remove all responsibilities from the Board. The Board was replaced by the Commissioner and the roles and responsibilities of governance were vested in the Commissioner. At that time the two specialist roles were ended and the Board dissolved. The Commissioner appointed was Ms Moore.

[36] The Commissioner was appointed due to concerns that the relationship between the Principal and the Board had become dysfunctional and this had impacted on the Board’s ability to govern. The Ministry was concerned that serious allegations had been raised during Ms Moore’s and Mr Rondel’s scoping exercise. Also, the amount of work to be undertaken to establish sound governance practice and the lack of experience in the new Board led the Ministry to become concerned the Board was not best placed to address the issues.

[37] A meeting was held on 16 February 2015 at which time the Board and Ms Burrows were advised of the appointment of a Commissioner. The notes of this meeting indicate a lot of questions were asked about why a Commissioner was being appointed and why the Board or Principal had not yet seen a copy of the two scoping reports from the specialist advisors.

[38] Those present at the meeting expressed their unhappiness with the decision to dissolve the Board and discussed the possibility of taking legal action in the form of a judicial review. Ms Sheppard, who was also present at the meeting, was requested to investigate and report on the value of challenging the Minister’s decision.

[39] The Board met on 18 February 2015. During that meeting a motion to advance \$25,000 to the Wynn Williams & Co trust account for the purpose of payment of legal and communication fees incurred by the Board was moved and carried.

[40] On the same day the Board met for its usual Board meeting. During this meeting one of the Board members resigned. It is common practice for the Board to discuss sensitive matters “*in committee*”. Where this occurs two sets of minutes are maintained for each part of the meeting. One set of minutes for the part of the

meeting held in public and another set of minutes for the “*in committee*” or “*public excluded*” part of the meeting.

[41] The usual minute secretary for the Board was unwell on the day of the Board meeting and another minute secretary attended in her place. The minutes of the meeting became a contentious issue between Ms Burrows and the Commissioner and became one of the reasons for Ms Burrows’ dismissal.

[42] The Board was formally dissolved on 26 February 2015 by notice in the New Zealand Gazette and by similar notice Ms Moore was appointed Commissioner.

[43] The Commissioner took over the governance of the school on or about 26 February 2015.

***Background events following appointment of the Commissioner***

[44] On 26 February 2015 Ms Burrows sent a broadcast email to a large number of Principals of secondary schools in the Canterbury, Buller and West Coast regions.

[45] Ms Burrows advised the recipients of her email that a Commissioner had been appointed and the Board had been disbanded. The information regarding the appointment of the Commissioner had not been made public at that time and this was recognised in Ms Burrows’ email when she instructed the recipients not to mention the appointment as the information was embargoed until the appointment had been gazetted.

[46] The Commissioner became aware of the broadcast email and on 26 February 2015 wrote to Ms Burrows and instructed her not to make any statements to the media concerning the circumstances of the School that led to her appointment.

[47] On 8 April 2015 Television New Zealand (“TVNZ”) aired a report during its 6.00pm news bulletin about the appointment of the Commissioner. The report made reference to the Commissioner investigating the Principal’s overseas travel. The report outlined information received through an Official Information Act 1982 (OIA) request which consisted of a heavily redacted copy of the Specialist Advisors report written by Ms Moore.

[48] On 14 April 2015 Mr Michael Parkin, the journalist at TVNZ who had led the TVNZ report that aired on 8 April 2015 wrote to Mr Matt James, a former Board

Chairman (and one of the three Board members who resigned in 2014), advising him that he had received an anonymous covering letter (“the anonymous letter”) together with a number bunch of briefing papers (“the TVNZ documents”) from a person, Mr Parkin describes as “*clearly close to [Ms Burrows] which suggests this is all about the land sale money*”. Mr Parkin attached a copy of the letter. Mr James notified the Commissioner of the email on 15 April 2015.

[49] In June 2015 Ms Burrows was subject to a disciplinary process which resulted in her being suspended and then dismissed nine months later on 7 March 2016.

[50] The School remains under the control of the Commissioner.

[51] My investigation did not encompass the reasons for the intervention as this is not within the Authority’s jurisdiction. The intervention was not an employment process and the Ministry was not Ms Burrows’ employer.

### **Issues**

[52] The issues for determination are whether one or more conditions of Ms Burrows employment was affected to her disadvantage by unjustifiable actions of the Commissioner and whether she was unjustifiably dismissed. If the answer to either one or both of those questions is yes then I will determine what, if any, remedies should be awarded.

### **Relevant policies/documents**

[53] As stated earlier, the terms and conditions of Ms Burrows’ employment were governed by a collective agreement. Part Two of the collective agreement sets out the responsibilities of both the Board of a school and the Principal. The Board is required to act as a good employer, ensure a performance agreement is in place, undertake an annual performance review, and ensure the Principal is provided with adequate resources to fulfil her responsibilities and duties.

[54] The Principal’s obligations are to carry out her duties honestly and diligently, not disclosing confidential or official information that has come to the Principal’s knowledge in the course of the performance of her duties or use such information or knowledge to her or another person’s personal benefit. At termination the Principal is required to deliver up all confidential or official information or any other property of

the School, the Board or the Crown which may be in her possession or under her control.

[55] Clause 4.3.1 states:

4.3.1 Where there is a problem in the working relationship between the principal and the board (including individual board members) that has not been informally resolved and is to the detriment of the school, the board, in consultation with the principal, may consider appointing a suitably qualified independent person to mediate or facilitate between the parties and/or undertake an impartial and objective assessment of the concerns.

...

[56] Clause 6.1 states:

6.1.1 The following principles shall be used in addressing complaints, discipline, and concerns regarding competence, to ensure that such matters are, in the interests of all parties, fully and fairly addressed:

- (a) where issues or concerns arise the board shall initiate informal discussions with the principal in an attempt to resolve the matter in an informal manner. This applies following receipt of a complaint and / or concern(s) being raised. This occurs prior to formally commencing a disciplinary or competency process, unless the nature of the complaint or concern(s) is such that this would be inappropriate;
- (b) questions of competence, conduct and discipline should be handled in a manner which, as far as possible, protects the mana and dignity of the principal concerned. Principals may seek whanau, family, professional and / or other support in relation to such matters (refer Part Eleven).

[57] Part Eleven deals with resolving employment relationship problems.

[58] Clause 6.3 sets out the agreement regarding how disciplinary actions will be implemented and states:

6.3.1 For the purposes of this part, the term misconduct includes:

- (a) any material breach of the terms of this agreement; or
- (b) any continued non observance or non-performance of any of the terms of this agreement; or
- (c) any offence for which the principal may be proceeded against by way of indictment; or
- (d) any conduct by the principal (whether within the principal's professional capacity or otherwise) that is unbecoming of a principal or which demonstrates that the principal is unfit to remain in the position of principal.

6.3.2 The principal must be advised of the right to have representation at any stage.

- 6.3.3 The principal must be advised in writing of the specific matter(s) causing concern and be given a reasonable opportunity to provide an explanation. Before making a final decision, the board may need to make further inquiries in order to be satisfied as to the facts of the specific matter(s) causing concern.
- 6.3.4 If the conduct is found to have occurred then the corrective action(s) that may be imposed, following an opportunity for the principal to comment, include:
- (a) counselling and/or mentoring intended to assist the principal amend his/her conduct and/or change particular behaviours;
  - (b) a verbal or written warning that includes advice of any corrective action required to amend his/her conduct and a reasonable opportunity to do so.
  - (c) A final written warning which includes advice of any corrective action required to amend his/her conduct and given reasonable opportunity to do so.
- 6.3.5 The board may also consider that the misconduct warrants dismissal with or without notice.
- 6.3.6 The process and any resulting action(s) are to be recorded, then sighted and signed by the principal, and placed on his/her personal file.
- 6.3.7 A copy of any report made to the board or provided to the New Zealand Teachers Council shall be given to the principal.

[59] Suspension is provided for at clause 6.4 which states:

- (a) If the alleged conduct is deemed sufficiently serious a principal may be either suspended with or without pay or transferred to other duties while the allegations are investigated.
- (b) The board shall not, unless there are exceptional circumstances, suspend the principal without first allowing the principal a reasonable opportunity to make submissions to the board about the alleged misconduct and the appropriateness of suspension in all of the circumstances. The board shall take into account any submissions made by the principal before determining the matter of suspension.
- (c) The board shall use its best endeavours to ensure that the period of suspension is kept to the minimum possible time consistent with ensuring that the allegations of misconduct are properly investigated and that the principal is treated fairly.
- (d) If the allegation that led to suspension is found to be without substance the principal shall, unless he/she has resigned in the interim, be entitled to resume duties immediately and, if suspended without pay, to have that pay reinstated from the date of suspension.

[60] The collective agreement provides for dismissal in the following terms:

- 6.5.1 The board may, after applying the principles and processes of 6.1 and 6.2 or 6.3 above, terminate the employment of the principal by giving two months' notice of termination or he/she may be dismissed without notice and paid two months' salary in lieu. In the case of a finding of serious misconduct, the board may dismiss without notice.

**Unjustified disadvantage**

[61] Ms Burrows claims one or more conditions of her employment were affected to her disadvantage by the unjustifiable actions of the Commissioner.

[62] Pursuant to section 103A I must be satisfied on the balance of probabilities that one or more conditions of Ms Burrows' employment were affected to her disadvantage due to the Commissioner's unjustified action. This requires a two-step process, firstly I must be satisfied of the disadvantageous actions and then I must determine whether those actions were justifiable.

[63] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether the Commissioner's actions and how she acted were what a fair and reasonable employer could have done in all the circumstances.

[64] Ms Burrows points to a number of factors which led to her disadvantage including:

- a) Allegations of bullying;
- b) Removal of delegations and responsibilities; and
- c) The intervention of the Commissioner into school management issues.

***Allegations of bullying***

[65] Ms Burrows claims she was subjected to systematic bullying by the Commissioner which affected her health and wellbeing. Ms Burrows says the bullying actions included the Commissioner's actions of:

- a) Threatening Ms Burrows with disciplinary action on the first day of her term as Commissioner;

- b) The undertaking of multiple investigations with broad or ill-defined terms of reference;
- c) Failing to take any action to defend Ms Burrows' reputation when false allegations were made against her in the media;
- d) Undermining Ms Burrows in her role;
- e) Failing to appropriately handle communications relating to her suspension;
- f) Conducting unfair and unreasonably protracted disciplinary processes;
- g) The removal of delegations and responsibilities;
- h) Accessing personal documents.

Threatening disciplinary action

[66] Ms Burrows claims the act of the Commissioner in threatening her with disciplinary action on the first day of her appointment as Commissioner was unjustified.

[67] Ms Burrows left on a period of leave on Friday 28 February 2015 to present a research paper at the University of Pennsylvania. The paper was related to research Ms Burrows had conducted as part of her PhD study.

[68] Prior to leaving Ms Burrows sent a broadcast email to Principals in the Canterbury, Buller and West Coast regions advising them that a Commissioner had been appointed and the Board had been dissolved. Ms Burrows stated that she was looking forward to working with the Commissioner in the best interests of the students, staff and parents/caregivers of the school. I note that in her communication Ms Burrows states:

The irony for me is I had in fact only just spoken to my sister school colleague Bruce Kearney, at our Principals' meeting on Friday morning, to dispel the concerns he had expressed about rumours in our local community about Rangiora High School "getting a commissioner." I too thought they were simply rumours.

[69] The statement that Ms Burrows thought the rumours were just that, lacks credibility given that she was at a meeting on 16 February 2015 where she was advised that a Commissioner was to be appointed and the Board dissolved.

[70] Ms Burrows was also aware that the information regarding the appointment of the Commissioner was embargoed, a fact she relayed to all recipients in her email.

[71] The Commissioner on becoming aware of the broadcast email wrote to Ms Burrows the same day instructing Ms Burrows not to make any statement to the media concerning the circumstances in the School that led to her appointment, the process of her appointment and the governance of the School prior to and during her time as Commissioner.

[72] The Commissioner, correctly in my view, advised Ms Burrows that any breach of the instruction would be viewed seriously and may lead to the commencement of disciplinary action.

[73] There was no disadvantage to Ms Burrows in being issued with this instruction. It is not uncommon for employers to reserve the right to decide who will make public statements and to instruct employees not to interact with the media.

[74] Further, in the context of Ms Burrows broadcasting inaccurate information, I find the instruction given to Ms Burrows, including the notification that a breach of the instruction would be considered misconduct, was an action a fair and reasonable employer could take in all the circumstances.

#### Multiple investigations

[75] Ms Moore entered into a written Memorandum of Understanding (MOU) with the Ministry on 24 February 2015 which details the following reasons for the intervention:

- There has been long-standing tension between the Board and Principal around governance and management roles, which has had a significant impact on the Board's ability to perform its functions and exercise its powers.
- The Board has delegated a lot of its governance role to the Principal.
- There have been some serious allegations raised of workplace bullying and intimidation that requires urgent independent investigation.

[76] The MOU between the Ministry and Ms Moore for the appointment of Ms Moore as Commissioner sets out the following specific tasks to be undertaken:

- Ensure that a performance agreement and appraisal system is in place for the principal of the school;
- Ensure that internal controls for management of finance are in place;
- Under section 78O(2) of the Education Act 1989, anything that, if done by or on behalf of the board, must be done by affixing the Board's seal, or by the signature of two or more trustees, or both, may be done by the signature of the Commissioner;
- Oversee the administration of the school including ensuring that Board correspondence is dealt with appropriately and promptly;
- Ensure that the Board's statutory requirements are met;
- Appoint a date for the election of trustees and arrange for a board of trustees election when the Secretary is satisfied that a Commissioner is no longer required for the school. This includes appointing, empowering and overseeing the work of a returning officer and setting an election date.

[77] After her appointment as Commissioner, Ms Moore initially instigated two separate investigations into Ms Burrows' conduct and behaviour. The investigations were:

- a) Allegations regarding the conduct of Ms Burrows – undertaken by Dr Sheila Grainger; and
- b) The management of three parent complaints received by the School during 2014 and 2015 – undertaken by Dr Pauline Stewart.

[78] In April the Commissioner instigated a third investigation into the disclosure of 11 documents to TVNZ. This investigation was undertaken by Mr Paul Bass.

*Dr Grainger's report*

[79] Dr Sheila Grainger was engaged by the Commissioner to investigate allegations regarding the conduct of Ms Burrows. The allegations included:

- a) How the Principal managed employment issues including investigating allegations of workplace bullying;

- b) The appropriateness and accuracy of the Principal's communication with the Board, and Commissioner within the school and the wider Rangiora Community;
- c) That documentation supplied to the Ministry on the Board's behalf by the Principal could be regarded as inaccurately representing student achievement levels at the school;
- d) Accuracy of Board Minutes and compliance with Board resolutions;
- e) Compliance with instructions from the Board, its solicitor or the Commissioner.

[80] Dr Grainger completed her draft report and submitted it to the Commissioner on 20 April 2015. Dr Grainger concluded that many of the concerns underpinning the allegations may be serious and may have substance but were not proven at that time.

[81] Dr Grainger concluded the allegations required investigation to ascertain whether there may have been serious misconduct which could lead the Commissioner to conclude that the Principles, Ethical Guidelines and Professional Standards for Principals and the teaching profession had possibly been breached.

[82] Dr Grainger recommended that the Commissioner undertake a formal investigation of the Principal's conduct in accordance with Part Six of the collective agreement. A formal employment investigation was warranted because, in Dr Grainger's view, there were conflicting accounts from different people about the same matters. Also the matters were varied and complex and the full context around them needed to be established and a more thorough analysis of the relevant documents and in-depth interviews would help to ascertain whether the allegations were established and whether they represented serious misconduct.

[83] Dr Grainger identified six specific areas for further investigation:

- a) Interference with a staff trustee election;

- b) Management of employment issues on behalf of the Board including investigating allegations of workplace bullying;
- c) The appropriateness, accuracy and integrity of the Principal's communication with the Board and the Commissioner within the school and the wider Rangiora community;
- d) Allegations that the documentation supplied to the Ministry by the Principal on behalf of the Board could be regarded as inaccurately representing student achievement levels at the school;
- e) The accuracy of Board Minutes and the Principal's integrity in complying with Board resolutions.

[84] Ms Burrows was notified in writing on 3 May 2015 that Dr Grainger was to be requested to undertake a complete investigation under clause 6.3 of the collective agreement. The issues raised by Dr Grainger in her report have not been investigated by the Commissioner as the events leading to these proceedings intervened. The Commissioner has advised me that if Ms Burrows is reinstated to her position as Principal, she intends completing the disciplinary process relating to these issues.

*Dr Stewart's report*

[85] The Commissioner was advised of three complaints that had been made by parents of three students enrolled at the school. These complaints related to matters arising during 2014 and 2015.

[86] Dr Pauline Stewart, an educational and counselling psychologist, was appointed to investigate the management of the three complaints.

[87] One complaint related to an alleged assault in October 2014 by a male student on a female student who had high learning needs. Another complaint concerned an alleged assault by a male student on a female student which occurred in February 2014. The third complaint related to a lack of communication with the mother of a student during 2014 involving the student's behaviour at the School. This was despite

the mother confirming with the School that her details had been recorded and that she would be notified.

[88] Each of the complaints escalated when the parents of the students felt their concerns were not being addressed. Dr Stewart reported areas of concern with respect to the processes followed by both the Principal and the Board when dealing with the complaints and found the following barriers to the successful resolution of the complaints:

- All 3 complaints involved, in part, actions by the Principal herself. In effect the parents saw that the Principal was investigating herself and it was their perception that this disadvantaged them in terms of a satisfactory outcome.
- Two of the complainants believe that the Principal influenced the Board of Trustees to the point where their concerns were not fairly addressed by those charged with governance. They believed this compromised impartiality and natural justice.
- External communications were at times barely satisfactory and at other times very poor in relation to long running issues.
- The complaints process took a very long time. It was also disrupted when the Board of Trustees was replaced. Parents report they felt powerless, and increasingly angry as time passed, especially in relation to the safety of two of the young people involved. Independent external assistance e.g. mediation, or even a qualified person to hear the parent voice impartially, may well have been able to assist in resolving issues before they escalated.
- The Principal's Personal Assistant was also the Board secretary and the complaints made to the Board were not acknowledged by the Board secretary at the time they were received, i.e. within 1 or 2 working days. In respect to [two of the students], the complaints appear to have been dealt with by the Principal when they were made to the Board, without communication from the Board to parents at the time the complaints were lodged. In respect to [one student] it was the Principal who acknowledged receipt of the formal letter of complaint to the Board 3 weeks after the complaint had been lodged with the Board.

[89] Dr Stewart made the following recommendations:

- a) A robust system together with information about all complaints made at the School be established and a complaints register be implemented as soon as possible.
- b) Alongside the development of a common understanding of the definition and process of complaints Dr Stewart recommended the School complaints policy and procedures be reviewed and revised to more accurately reflect

the actual process of complaints. The revision should include consideration of how complainants with literacy challenges can be assisted to make a complaint.

- c) A separate process be identified in the complaints policy as to the process to be followed in any complaint about the Principal or the Board.
- d) If the Principal's Personal Assistant continues as the Board secretary a clear understanding and distinction be reflected in each of the two different job descriptions with respect to the separate roles and duties of a Principal's Personal Assistant and of a Board secretary.
- e) A lead worker be assigned to every student where there is a major event, incident or situation, until this person is no longer required by the family/caregivers.
- f) After any physical assault an independent assessment of trauma is undertaken.
- g) A short list of possible mediators be identified who could support the school prior to a formal written complaint.
- h) Special needs in the school in the widest sense, be reviewed including provision for students in the Mainstream Support Unit.
- i) When senior management, Deans, Head of Department and guidance staff are meeting with parents/caregivers, a brief agenda is set before the meeting (or at least before the meeting commences) so that all participants know what is going to be discussed in the meeting. After the meeting brief notes should be circulated within two days of the meeting with an invitation to amend notes, so there is no misunderstanding about what transpired at the meeting on a later date.

- j) All complaints made to the Board are acknowledged in writing by the Board secretary within one working day of being received whether the complaints are received by the Board by email or in written letter form.
- k) A forum facilitated by a person with knowledge in the area of boundary training be provided for all staff so that they can participate in a facilitated discussion to discuss and agree on best practice with regards to off site visits.
- l) The use of accurate records on KAMAR be discussed with staff and the importance of noting all contacts encouraged.
- m) Independent exit interviews be conducted with staff leaving the School.
- n) The final report (or a redacted version of it) be shared by the Commissioner with the parents concerned.

[90] No issues about the conduct of the Principal were raised and no actions regarding the Principal's conduct were recommended.

#### *The Bass Report*

[91] Mr Paul Bass was engaged by the Commissioner to investigate the circumstances of the disclosure of the 11 TVNZ documents to TVNZ and determine the person or persons who may have been involved.

[92] Mr Bass provided the Commissioner with a written report dated 28 May 2015 ("the Bass Report") in which he concluded that motivation and opportunity would support his premise that Ms Burrows had played a part or some part in the release of the TVNZ documents. Mr Bass reported that Ms Burrows did not have access to at least one of the documents which supported his premise that another member of the senior leadership team also played a part in collating/assembling the documents.

[93] Following receipt of the Bass Report the Commissioner undertook a disciplinary process which led to Ms Burrows' dismissal on 7 March 2016.

*Conclusion*

[94] The MOU signed between the Commissioner and the Ministry identified as one of the reasons for the intervention being serious allegations of workplace bullying and intimidation that required urgent independent investigation. Despite this being recognised as a matter to be dealt with urgently, Dr Grainger was not asked to investigate bullying allegations against Ms Burrows.

[95] Both the Terms of Reference setting out the parameters of Dr Grainger's investigation and the letter to Ms Burrows state that what is being investigated is how Ms Burrows managed employment issues which included investigating allegations of workplace bullying. This is not the same thing as investigating allegations that the Principal has conducted herself in a way that could give rise to bullying complaints.

[96] Dr Stewart's investigation was not an investigation into Ms Burrows' conduct, but was to determine how the school managed complaints. Ms Burrows' claims the complaints were historical, however, I am satisfied that at least two of the complaints had not been fully resolved when the Commissioner was appointed and one of the complainants had raised concerns at Ministry level.

[97] The Commissioner was concerned to learn in April 2015 of the disclosure of the TVNZ documents. Mr Bass was engaged to investigate who may have disclosed the documents. This was a reasonable action by the Commissioner who was concerned that some of the TVNZ documents contained confidential information.

[98] Ms Burrows says she was disadvantaged in her employment as a result of the three investigations as they were all happening at the same time and were conducted outside the parameters of Part Six of the collective agreement.

[99] Ms Burrows says the combination of investigations became stressful which led to her becoming unwell and needing to take six months off to recover.

[100] I am satisfied that two and then three investigations happening at the one time disadvantaged Ms Burrows to the extent that she became unwell and required significant time off to recover. Having determined Ms Burrows was disadvantaged I must consider whether the actions of the Commissioner are justified.

[101] For the following reasons I am satisfied the actions of the Commissioner in instigating the investigations were actions that an employer acting fairly and reasonably could have taken.

[102] Firstly, the allegations of bullying that Ms Burrows had previously investigated were allegations against her personally, it was appropriate that the way in which Ms Burrows had investigated those allegations was scrutinised.

[103] Secondly, the investigation into the handling of the parental complaints was not an investigation into Ms Burrows' conduct but was an investigation into the procedure of the handling of such complaints. A large number of the recommendations from Dr Stewart have now been implemented.

[104] Finally, the Commissioner was concerned about the disclosure of potentially confidential information to a media source. It was reasonable for the source of the disclosure to be investigated and I am satisfied that this, at least at the outset, was the purpose of Mr Bass's investigation.

[105] I am satisfied that until 3 May 2015 none of the three investigations had reached the stage of being disciplinary or performance concerns needing to be addressed under Part Six of the collective agreement. In particular Dr Stewart's investigation was not about Ms Burrows personally, but about process.

Failing to defend Ms Burrows reputation when false allegations were made against her in the media

[106] Ms Burrows claims the report aired by TVNZ on 8 April 2015 was inaccurate and was damaging to her reputation. Ms Burrows says the Commissioner could have taken steps to correct the inaccuracies and that the refusal to do so caused considerable embarrassment and was undermining of her position as Principal.

[107] The report aired by TVNZ opened with a statement that the Commissioner was investigating the Principal's overseas travel at a time when the School had been told to cut costs. This statement was incorrect. The Commissioner confirmed at the investigation meeting that she was not investigating Ms Burrows' overseas travel.

[108] The TVNZ report was based on information released under an OIA request which included a heavily redacted copy of Ms Moore's Specialist Advisor Report.

The copy of the Specialist Advisor Report provided to TVNZ left reference to Board resolutions regarding the approval of funding for travel, but removed the identity of the position to which it related.

[109] The un-redacted section of the Specialist Advisor Report goes on to critically observe that the recommendations put to the Board by the Principal were contrary to advice received and stated that it was difficult to relate to a direct benefit to the students. In addition, the redacted version leaves open reference to “*an exceptionally high turnover of Chairpersons*” and later includes comments that had been received by the Specialist Adviser that were critical of the Principal’s leadership.

[110] Ms Burrows claims that the TVNZ report accused her of misappropriating funds. I have had the benefit of a transcript of the TVNZ article and am satisfied that, while the statement that Ms Burrows’ overseas travel was being investigated is incorrect, the TVNZ report does not accuse Ms Burrows of misappropriating funds.

[111] Ms Burrows says that in the absence of any further explanation or correction from the Commissioner, it was open to the media to create its story based on the information provided in the Specialist Advisor Report.

[112] I agree that the Specialist Advisor Report had been redacted in such a way that it left open an interpretation that the Board had approved funding for the Principal’s travel. This was not the case. The Board had approved funding for a Deputy Principal and a Board member to accompany Ms Burrows.

[113] Ms Burrows says the Commissioner had a duty to take steps to correct the story and requested the Commissioner to take steps to correct the misinformation advising her that the refusal to comment was the cause of considerable embarrassment and was undermining of her position as Principal.

[114] Ms Burrows says the situation could easily have been remedied by the drafting of a statement to TVNZ to put it on notice that its reporting was not accurate. The Commissioner could have advised TVNZ that she was not investigating the Principal’s overseas travel or her spending and that the reported cost of travel to two international events was not for the Principal but that the cost of the Principal’s travel to attend the Forum in Pennsylvania had come out of her professional development budget.

[115] In her oral evidence, the Commissioner accepted the inaccuracies of the news report and its damage to Ms Burrows. The Commissioner put this down to the media misrepresenting the situation. Further, the Commissioner says while Ms Burrows did request that she comment on the report Ms Burrows only claimed one inaccuracy which related to the international travel costs and did not raise a personal grievance at the time in relation to this issue. The Commissioner does not consent to the grievance being raised outside the requisite 90 day period.

[116] I am satisfied Ms Burrows has not established that she raised a personal grievance relating to the publication of the TVNZ report within 90 days as required by section 114 of the Act. There is no evidence the Commissioner has consented in any way to this aspect of Ms Burrows' grievance being raised outside the 90 days and in the absence of an application for leave to raise the grievance outside the 90 day period, I am unable to be of further assistance regarding this aspect of Ms Burrows' claims.

#### Undermining Ms Burrows in her role

[117] Ms Burrows claims the following actions of the Commissioner undermined her in the undertaking of her role as Principal and resulted in her being disadvantaged:

- a) refusing to disclose allegations;
- b) undertaking inquiries of others within the school community and initiating an investigation without Ms Burrows' knowledge, including discussions with former Board members, staff and instigating a search of Ms Burrows' laptop;
- c) conducting discussions with members of the senior leadership team without Ms Burrows' knowledge that undermined their working relationship and trust including disclosing her Specialist Advisor Report and the Ministry opinion concerning the farmland issue without reference to the School's previous legal advice which caused members of the senior leadership team to distrust Ms Burrows; and

- d) authorising a casino visit for maths students without discussion or reference to Ms Burrows.

*Failure to disclose allegations*

[118] It was not clear in the Statement of Problem which allegations Ms Burrows says were not disclosed to her and that undermined her in undertaking her role. In the submissions received on her behalf Ms Burrows seems to claim that the allegations were allegations apparently made to Ms Moore in her capacity as Specialist Advisor.

[119] The allegations recorded in the Education Report that went to the Minister were stated as being “*serious allegations of bullying, intimidation and retaliation by the Principal that requires urgent independent investigation*”.

[120] In a letter to the Commissioner dated 13 April 2015 Ms Burrows requested the information relied on by the Commissioner in respect of these allegations. Following on from this request, Ms Burrows also wrote to Dr Grainger requesting the specific allegations of work place bullying. No information directly relating to these allegations was forthcoming.

[121] Ms Burrows says she has been denied the opportunity to challenge the allegations and be heard on them.

[122] I am not satisfied Ms Burrows has established her employment has been affected to her disadvantage in relation to not receiving information pertaining to unspecified allegations. Dr Grainger made adverse findings in her report, but Ms Burrows had a copy of that report and met with the Commissioner to discuss Dr Grainger’s findings. At the time of my investigation into Ms Burrows’ claims no disciplinary or other action had been taken by the Commissioner as a result of Dr Grainger’s report.

[123] I am satisfied it is more likely than not that the allegations referred to relate to issues raised in the Specialist Advisor report and which were then reflected in the Education Report. These actions were not the actions of Ms Burrows’ employer at the time the allegations were made. At the relevant time, the Board was Ms Burrows’ employer, not the Specialist Advisor and not the Ministry.

*Inquiries of others within the school community, initiating investigations without Ms Burrows' knowledge and searching Ms Burrows' laptop*

[124] Ms Burrows claims the Commissioner's actions in undertaking inquiries with others within the school community and initiating an investigation without her knowledge including discussions with former board members and staff and then instigating a search of Ms Burrows' laptop undermined her in her position as Principal.

[125] Ms Burrows says the Commissioner undertook inquiries of the immediate past Chairman of the Board and a past Board member regarding the minutes of the 18 February 2015 meeting and instigated investigations without her knowledge including searching her laptop.

[126] Both of these complaints relate to the Commissioner's investigation into the 18 February 2015 minutes. I have discussed these issues in more detail later in this determination when I have dealt with the unjustified dismissal claims. For the sake of completeness I record here that I am not satisfied this action by the Commissioner led to one or more conditions of Ms Burrows' employment being affected to her disadvantage.

*Discussions with members of the senior leadership team without Ms Burrows' knowledge*

[127] Ms Burrows claims that the Commissioner's actions in discussing her Specialist Advisor Report and the second opinion (regarding the use of the farm lands funds) with the senior management team without her involvement or knowledge undermined her in her role as Principal.

[128] The discussions the Commissioner held with the senior leadership team regarding the second opinion led to the development of a significant trust issue between Ms Burrows and her team.

[129] I have concluded that the discussions took place while Ms Burrows was overseas in February 2015. Ms Burrows gave evidence, which was supported by the evidence given by members of her senior leadership team that the relationship she had with the team was not the same when she returned from overseas. Ms Burrows'

evidence is that when she returned she felt isolated and did not feel able to discuss matters with her team.

[130] Ms Burrows was not told of the discussions the Commissioner had had with the senior leadership team and was never given the opportunity to address the team on the two differing legal opinions which had been received by the Board on the use of the farm lands funds. The Commissioner did not advise the senior leadership team of the existence of the previous legal opinion and did not provide a copy of it to the team.

[131] At the investigation meeting Ms Sheppard was questioned about the two differing legal opinions. Ms Sheppard told me she did not necessarily agree with the Ministry's opinion and stood by her original opinion.

[132] I am satisfied one or more conditions of Ms Burrows' employment were affected to her disadvantage when the Commissioner disclosed the content of her Specialist Advisor Report and the second opinion from the Ministry regarding the use of the farm land funds to the senior leadership team without Ms Burrows' involvement or knowledge.

[133] At the time the Commissioner discussed the Specialist Advisor Report with the senior leadership team Ms Burrows had not had the benefit of reading the report or responding to any of the concerns raised within the report. Ms Burrows was unaware of the content of the report. Further, the Commissioner specifically requested the senior leadership team members not to discuss the matters with Ms Burrows.

[134] The action by the Commissioner of disclosing the documents and discussing the report at the time it was done were not the actions an employer acting fairly and reasonably could have taken.

*Authorising a casino visit*

[135] This complaint is addressed later on in this determination where it has been discussed in relation to the Commissioner interfering in the management of the School.

Failing to appropriately handle communications relating to her suspension

[136] Ms Burrows claims that the fact of her suspension was not notified to anyone and the fact of her suspension became the topic of rumour and speculation which was embarrassing.

[137] By letter dated 5 June 2015 the Commissioner advised Ms Burrows that it was her intention to consider suspending Ms Burrows and that she was implementing a disciplinary process in respect to the Bass Report, Ms Burrows accessing her computer in circumstances where she had agreed not to, and in relation to the minutes from the Board meeting held on 18 February 2015.

[138] Ms Burrows was given the opportunity to discuss the intended suspension at a meeting with the Commissioner on 19 June 2015. During that meeting Ms Burrows was given alternative options including working away from the school premises or taking leave. Neither of these options was favoured by Ms Burrows and on 21 June 2015 the Commissioner suspended Ms Burrows from her employment. No formal announcement was made of the suspension and at all times the Commissioner referred to Ms Burrows as being on leave.

[139] In her statement of problem Ms Burrows claims her suspension was protracted, extremely public and poorly handled. Ms Burrows claims that the Commissioner failed to provide any information about her suspension and that not saying anything left it open for people to speculate on why she was not at work.

[140] Further, in her submissions Ms Burrows claims that not providing information advising the school community, particularly the teaching staff, of not only the suspension but also the reasons for the suspension, left staff wondering what was going on as they all knew Ms Burrows was not on leave. This submission is inconsistent with Ms Burrows claim in her statement of problem where she is critical of the Commissioner about teaching staff being told of her suspension and, in particular, that one teacher announced it to the School First XV on 20 June 2015.

[141] Ms Burrows has not established that one or more conditions of her employment were affected to her disadvantage as a result of the Commissioner not communicating Ms Burrows' suspension.

[142] Apart from the Commissioner's obligation to maintain Ms Burrows' privacy, it was public knowledge that Ms Burrows had been suspended. This fact had been reported on social media by Ms Burrows. Also, there was a campaign by supporters of Ms Burrows seeking her reinstatement which began in October 2015 while Ms Burrows was suspended and on sick leave, but had not yet been dismissed.

#### Conducting unfair and unreasonably protracted disciplinary processes

[143] Ms Burrows claims the disciplinary process was unreasonably protracted. I am not satisfied this was the case. Following her suspension on 21 June 2015 Ms Burrows became unwell and proceeded on a period of sick leave on 7 July 2015.

[144] Ms Burrows was cleared by her general practitioner to return to work on 3 November 2015. The Commissioner was concerned that Ms Burrows was required to return to a disciplinary process. To ensure she was able to undertake that process without putting her health at risk the Commissioner required a second assessment of Ms Burrows' capacity to return to that situation. Ms Burrows agreed to undergo a second medical assessment and on 4 December 2015 she was cleared to return to work and the disciplinary process.

[145] Ms Burrows has not established the disciplinary process was unreasonably protracted by any action of the Commissioner. The disciplinary process did not recommence until January 2016 due, firstly to Ms Burrows' absence on sick leave, the intervening summer break and then the unavailability of her representative.

#### Accessing personal documents

[146] Ms Burrows claims the Commissioner accessed her personal documents, in particular, a legally privileged communication between herself and her lawyer without her consent.

[147] The Commissioner says that Ms Burrows had put a copy of the Education Report (which had led to the intervention) on which Ms Burrows had made her own notes into an envelope and handed it to one of her Deputy Principals for safe keeping. The Deputy Principal gave it back to Ms Burrows who put it in her office. The document was then removed from the envelope and was included in a bundle of documents provided to Ms Burrows as part of Dr Grainger's investigation.

[148] I am satisfied the envelope was not marked confidential and it was not a communication between Ms Burrows and her lawyer. Ms Burrows has not established the Commissioner accessed her personal documents without consent.

Removal of delegations and responsibilities

[149] Ms Burrows claims that on 7 May 2015 the Commissioner removed a number of her responsibilities including responsibilities relating to:

- The Rangiora High School Trust;
- The Rangiora High School Farm Committee;
- The Rangiora High School Farmland Funds Management; and
- Financial delegations.

[150] The Commissioner says she was mandated to review both the general delegations and the financial delegations of the Principal. The intention to amend a number of the Boards delegations to the Principal was discussed with Ms Burrows during a meeting on 15 April 2015.

[151] The Rangiora High School Trust could not function because it required 50% of its trustees to be from the Board, which at that time was dissolved.

[152] The Farm Committee had not existed since 2009 and the Commissioner was acting in accordance with Mr Rondel's recommendations when she reviewed the School farm monies management and the financial delegations.

[153] At their weekly meeting on 13 May 2015 the Commissioner again put Ms Burrows on notice that she was reviewing the delegations, provided Ms Burrows with a copy of the delegations and invited her to look at them and seek advice. Ms Burrows requested the opportunity to discuss any changes. The Commissioner confirmed this would not be a problem and if Ms Burrows wished to have more time a meeting would be arranged. The Commissioner says Ms Burrows did not provide feedback and in fact the delegations were never changed.

[154] I am satisfied the Commissioner did not remove any responsibilities from Ms Burrows and her claim that this affected her employment to her disadvantage is not established.

Changes of policy and interference with the management of the School

[155] Ms Burrows claims the Commissioner changed a number of school policies and intervened in school management issues that would normally be the responsibility of the Principal. By way of example Ms Burrows told me the Commissioner approved of a school trip to the Christchurch Casino after she [Ms Burrows] had declined the application made by one of her senior members of staff, concluded a staff survey which was sent to former employees without her knowledge and initiated investigations without her knowledge.

[156] The Commissioner says she was mandated to implement a number of new policies recommended by the Ministry but denies interfering in school management issues.

*Casino trip*

[157] Ms Burrows claims the Commissioner approved a school field trip after she had declined it and that this undermined her and interfered in the management of the school.

[158] The Commissioner told me she received a request from a senior staff member regarding a proposal for a field trip to the Christchurch Casino. The Commissioner told me that if she had been aware that Ms Burrows had previously declined the trip she would not have engaged over the matter. The Commissioner advised the member of staff that she had no objection to the field trip and acknowledges she did this without reference back to Ms Burrows. The Commissioner told me she did this because Ms Burrows was not at the school at the time.

[159] Ms Burrows raised this issue with the Commissioner during their weekly meeting on 13 May 2015. The notes from this meeting record a summary of the discussion and the Commissioner's agreement that having an additional conversation (presumably with Ms Burrows) would have been useful.

[160] Ms Burrows' complaint is that the Commissioner "*approved*" the field trip. The Commissioner told me that she did not "*approve*" it but simply held no objection to it.

[161] I find it is more likely than not that the Commissioner did not "*approve*" the trip but rather provided her opinion as to whether the field trip was suitable. The notes from the meeting on 13 May 2015 record the Commissioner advising Ms Burrows that she had spoken with the Deputy Principal, and had also contacted the Casino. The Casino had confirmed it had a health and safety plan in place and students were not going to be in any restricted area.

[162] The Commissioner is recorded as advising Ms Burrows that the planning appeared well done and if the proposal met the Schools' policy she had no objection.

[163] At the investigation meeting into Ms Burrows' claims, Ms Burrows told me that when she had received the request for the trip to the Casino she advised the staff member that the students could not attend in uniform. Ms Burrows told me she advised the staff member to seek the Commissioner's opinion about the proposed field trip.

[164] I find the Commissioner's action in providing her opinion as suggested by Ms Burrows did not undermine Ms Burrows' role as Principal. The Commissioner undertook her own research into the proposal and advised the staff member that she had no objection to a school trip. This was not authorisation for the trip. The Commissioner told me that the Deputy Principal in charge of the Maths department had already approved the trip she was simply doing what the staff member requested and the staff member was simply following Ms Burrows' own suggestion.

#### *Staff Survey*

[165] Ms Burrows also claims under this heading that the Commissioner required former employees to take part in an on-line survey and that this was done without Ms Burrows being informed despite it being the Principal and not the Commissioner who is the School's chief executive.

[166] At the investigation meeting Ms Burrows told me it was not the survey as such that she was concerned about. Ms Burrows told me response sheets were put in the

staff room and put in a box and the survey was done manually. This evidence is inconsistent with the claim in her statement of problem that it was an on-line survey.

[167] Ms Burrows told me that her complaint was being asked to arrange for a box to be used for staff to deposit survey responses, rather than use a more professional online forum.

[168] The survey referred to was conducted by Ms Moore in her role as Specialist Advisor, not in her role as Commissioner. I find no disadvantage arises as a result of the staff survey as at the time it occurred there was no direct employment relationship.

*Initiating investigations without Ms Burrows knowledge*

[169] Ms Burrows claims the Commissioner initiated an investigation with others without her knowledge. Specifically that the Commissioner initiated forensic investigations with the company Shape IT in relation to the 18 February 2015 minutes.

[170] It was common knowledge that Ms Burrows and Ms Horne's computers had been cloned. Shape IT was the company that had been instructed to undertake the cloning of the computers.

[171] When investigating the 18 February 2015 minutes the Commissioner instructed Shape IT to review its forensic information regarding the access and alteration of the 18 February 2015 minutes.

[172] This information was provided to the Commissioner and the results were set out in a letter to Ms Burrows dated 9 February 2016 which also attached a copy of the email communications with Shape IT and the documentation provided by the company.

[173] Ms Burrows has not established to my satisfaction that the Commissioner's actions in this regard affected her employment to her disadvantage.

**Unjustified disadvantage claims – conclusion**

[174] As set out above I have found one or more conditions of Ms Burrows' employment were affected to her disadvantage by unjustifiable actions of the Commissioner when she disclosed the content of her Specialist Advisors Report and

the second opinion from the Ministry regarding the use of the farm land funds to the senior leadership team without Ms Burrows' involvement or knowledge.

[175] Ms Burrows is entitled to a consideration of remedies for her disadvantage grievance.

### **The dismissal**

[176] Ms Burrows was dismissed by the Commissioner on 7 March 2016 after the Commissioner had found that Ms Burrows had conducted herself in a manner that amounted to serious misconduct in relation to:

- a) Ms Burrows release of confidential documents or her assisting others to release confidential documents to the media;
- b) Ms Burrows accessing her computer when she had a clear and lawful direction not to and in circumstances where she had agreed not to; and
- c) Ms Burrows presenting to the Commissioner for her signature Board minutes which Ms Burrows knew were incorrect.

[177] The Authority must consider the four procedural fairness factors set out in section 103A(3) of the Act. These are whether the allegations against Ms Burrows were sufficiently investigated, whether the concerns were raised with her, whether she had a reasonable opportunity to respond to the concerns and whether such explanation was considered genuinely by the Commissioner.

[178] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[179] The Court of Appeal has recently confirmed that the effect of section 103A(3) is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings.<sup>2</sup>

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<sup>2</sup> *A Ltd v H* [2016] NZCA 419 at [46].

[180] There may be a range of responses open to a fair and reasonable employer. The Authority's task is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer<sup>3</sup>.

[181] Employers of teachers must act to a high standard when their decisions can have consequences which the Court has described as being in the nature of double jeopardy of the livelihood of a teacher/school Principal as dismissal not only results in the loss of the immediate job but also triggers automatically a professional registration investigation.<sup>4</sup>

[182] The Commissioner found Ms Burrows had misconducted herself to such an extent that she had lost trust and confidence in her. The Court held in *Edwards*<sup>5</sup> that:

...justification for a dismissal that relies upon a generalised loss of trust and confidence will require that this state of affairs is attributable to the employee and not to the employer.

#### ***Release of documents to TVNZ***

[183] Mr Parkin emailed Mr James on 14 April 2015 advising him that he [Mr Parkin] had received a bundle of eleven documents and the anonymous letter. Mr James forwarded the information onto the Commissioner.

[184] The Commissioner told me she received the documents by email from Mr James. The email Mr Parkin sent to Mr James does not support the Commissioner's evidence, the email from Mr Parkin appears to only attach the anonymous letter. It is not clear, how the Commissioner received the eleven documents from Mr James. I have not received a satisfactory response to my enquiries through the investigation process despite my request for a copy of the actual email to which the documents were attached.

[185] When the Commissioner received Mr James' email, and in light of her earlier instruction to all staff not to communicate with the media, the Commissioner became concerned that a breach of her instruction had occurred. The Commissioner instructed Mr Bass to investigate the disclosure of the documents to TVNZ and to enquire into

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<sup>3</sup> *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

<sup>4</sup> *Edwards v The Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [15]; *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4; [2010] ERNZ 1 at [5] and [6].

<sup>5</sup> *Ibid* at [18].

the circumstances of the disclosure and determine the person or persons who may have been responsible.

[186] Mr Bass undertook a search of the School's computer systems. The School operates a general G:/drive which is accessible by all staff. All employees are also able to draft and save documents to a P:/drive to which only the individual staff member has access, with the exception of Ms Burrows' P:/drive. Ms Horne also had access to Ms Burrows P:/drive.

[187] I pause here to record my surprise that Mr Parkin dealt directly with Mr James over this issue given that Mr James was no longer a member of the Board and Mr Parkin had already been communicating directly with the Commissioner on matters related to the School in February and March 2015.

[188] When I asked the Commissioner about this she was unable to provide any satisfactory answers. The Commissioner had not made any enquiries of Mr Parkin regarding how Mr James received the documents or why he felt the need to communicate directly with Mr James.

[189] The eleven documents which were said to have been supplied to TVNZ were:

<b>Number</b>	<b>Date</b>	<b>Subject</b>
1	5 September 2014	Briefing paper re Rangiora High School Farm Land Issue
2	4 July 2014	Letter from the Ministry to Wynn Williams regarding Farm Land issue
3	6 May 2014	Report to the Rangiora High School Community – Farm Land Funds 2009-2014
4	2013	Assets Portfolio
5	2009-2014	Rangiora High School Education Trust Applications for Funding
6	2011	Rangiora High School Education Trust Annual Staff Scholarship
7	2010	Rangiora High School Education Trust Annual Scholarship Staff Reminder Notice

8	Undated	Response to Workplace Bullying concerns raised in 2014
9	12 December 2011	Letter to the Board regarding Farm Land Purchase
10	28 April 2010	Letter from Solutions & Services to the Principal
11	Various	Rangiora High School Overseas Trip Expenses Summary 2012 – March 2015

[190] As stated earlier Mr Bass concluded that motivation and opportunity supported his premise that Ms Burrows had played a part or some part in the release of the TVNZ documents.

[191] The Commissioner wrote to Ms Burrows on 29 May 2015 inviting Ms Burrows to meet with her to discuss the Bass Report. A full copy of the report and supporting documentation was attached. Ms Burrows was advised that the meeting would be informal but due to the seriousness of the issues to be discussed the Commissioner urged Ms Burrows to bring a support person or her solicitor.

[192] The timeframe was quite narrow and Ms Burrows requested the meeting be delayed to allow her time to discuss the report and associated documents with her legal advisor.

[193] Ms Burrows met with the Commissioner on Wednesday, 3 June 2015. At this meeting Ms Burrows advised the Commissioner that she had not had an opportunity to read through the whole report or to seek legal advice. Ms Burrows maintained she had not provided the documents to TVNZ. When asked if she knew who had provided the documents to TVNZ Ms Burrows would not speculate.

[194] On 5 June 2015 the Commissioner wrote to Ms Burrows advising her that a disciplinary investigation would be carried out with respect to the documents provided to TVNZ. The Commissioner advised Ms Burrows that she was intending to suspend Ms Burrows and invited her to discuss the suspension at a meeting.

[195] As events transpired, the meeting to discuss the Bass Report and Ms Burrows suspension did not occur until 19 June 2015. There was considerable discussion at

this meeting about the disclosure of the documents to TVNZ. Ms Burrows denied in very strong terms that she had disclosed any documents to TVNZ. Ms Burrows acknowledged she received a copy of a letter via email from Mr Michael Parkin and this email was immediately forwarded to the Commissioner in accordance with the Commissioner's instructions that she not speak to the media.

[196] On 21 June 2015 the Commissioner advised Ms Burrows that her employment would be suspended on full pay until the completion of an investigation into:

- a) The allegations outlined in the Bass Report.
- b) Ms Burrows accessing of her computer contrary to a direction that she should not, and her agreement that she would not access it.
- c) Presenting Board minutes for signature despite Ms Burrows' knowledge that the minutes were incorrect.

[197] The Commissioner concluded that suspension was the only option given Ms Burrows comments at the meeting on 19 June 2015 that the relationship between the Commissioner and Ms Burrows was one of mistrust. In reaching her conclusions the Commissioner also took into account Ms Burrows rejection of other options such as working at other duties away from the school premises or a period of leave.

[198] Ms Burrows became unwell and was medically unfit to return to work or participate in the disciplinary process until late December 2015.

[199] After being cleared to return to work Ms Burrows provided a full response to the allegations contained in the 21 June 2015 letter on 28 January 2016. In her response Ms Burrows raises concerns about the completeness of notes taken during the meeting on 19 June 2015 and mistakes contained in the Bass Report.

[200] Specifically Ms Burrows raised the following concerns about failures by Mr Bass:

- a) Mr Bass failed to provide any findings or investigate the circumstances of the disclosure of documents to TVNZ;

- b) Mr Bass failed to provide any details around the circumstances of the disclosure of the documents to TVNZ;
- c) Mr Bass failed to provide any information regarding the results of any inquiries made by him under the circumstances of that disclosure; and
- d) Mr Bass failed to determine the person or persons who may have been responsible.

***Conclusions from The Bass Report and the Commissioners' disciplinary investigation***

[201] I have set out below the conclusions reached by the Commissioner in relation to each of the TVNZ documents during her disciplinary investigation to avoid unnecessary repetition.

Document 1 - Briefing paper re Farm Land Issue

[202] This document was a briefing paper Ms Burrows had prepared for the new Board on 5 September 2014 relating to the Rangiora High School Farm land issue. An electronic copy of this document was not located on Ms Burrows' computer. A copy was located in the Asset Management Group file box located in Ms Burrows' office.

[203] The Commissioner found that the document was available to Ms Burrows and that she had access to it.

[204] According to the spreadsheet provided by Mr Bass as part of his report at least three past members of the Board also had copies of this document which had been scanned and emailed to them. The Commissioner made no further enquiries of the past Board members following receipt of Mr Bass's spreadsheet information and there is no recognition in the body of the Bass Report that the past Board members had received the document via email.

Document 2 - Letter from the Ministry to Wynn Williams regarding Farm Land issue

[205] This document was the second opinion dated 4 July 2014. The document provided to TVNZ was a copy of a highlighted version which had been highlighted personally by the Commissioner. The Commissioner had made the document

available to a number of people. Mr Bass was unable to locate a copy of the highlighted document at the School.

[206] At all times, Ms Burrows denied having a copy of the TVNZ version of the document with the highlighting by the Commissioner. She acknowledged having a copy of the document but that document was stamped and notated. Ms Burrows had provided Mr Bass with a copy of the version she had.

[207] Deputy Principal Mr Brian Hays was handed four copies of the letter. He circulated three copies of the letter on 26 February 2015 when Ms Burrows was overseas. All four of the staff members who had received a copy of the document (including Mr Hays) told Mr Bass that they had destroyed the document soon after receiving it.

[208] This proved to be incorrect. Mr Hays later found a copy of the letter at his house among other documents he had at home. He returned his copy to Mr Bass who noted that the copy Mr Hays had, was not highlighted.

[209] During my investigation evidence emerged that there was in fact only one copy of the highlighted letter and that was received by Deputy Principal Mr Chris Quigley. Mr Quigley's uncontested evidence was that his copy of the letter was highlighted and he had destroyed it soon after receiving it.

[210] In her findings the Commissioner states:

- This is the document that I highlighted for Brian Hays but it is clear that he did provide it to others, in the senior leadership team. You say that you did not have access to it. The senior leadership team have offices close to yours and you are in and out of those offices frequently. It is therefore likely that you would have been aware of the document and you would have had it available to you had you wished to retrieve it.

[211] The Commissioner's finding ignores the information contained in the Bass Report that the document provided to Mr Hays and other members of the senior leadership team had been destroyed soon after receiving them and that Ms Burrows was overseas at the time it was circulated.

[212] In his report, Mr Bass stated a concern that he felt Mr Quigley's response about what he did with the document was coached or rehearsed. The Commissioner did not follow that up or seek any further clarification on it.

Document 3 - Report to the School Community – Farm Land Funds 2009-2014

[213] This document was a report to the Rangiora High School Community dated 6 May 2014 in relation to Farm Land Funds. The document included a time line from 2007 to 2014 with notes of actions that the Board had taken in relation to the sale and potential purchases of various properties and included a document entitled “Protocols Developed for the Purchase of Farm Land”.

[214] Mr Bass acknowledged in his report that this document was widely distributed within the School and community and was tabled at a Board meeting on 17 December 2014.

[215] The Commissioner also found that document three was widely available within the community and that it would have been available to Ms Burrows.

Document 4 - Assets Portfolio

[216] This was a strategic planning document summarising the Assets Portfolio of the Rangiora High School Education Trust dated 2013. Mr Bass found two copies of this document existed. When asked to provide the document Mr Bass says Ms Burrows provided a different version to the one disclosed to TVNZ. The document provided by Ms Burrows had two columns whereas the one provided to TVNZ had three columns. The two column version of the document was distributed to Education Trust members on 27 March 2013.

[217] Mr Bass did locate a copy of the TVNZ version in the Asset Management Group box under the September 2014 Meeting Agenda documentation which was located in Ms Burrows’ office. Mr Bass noted that the document did not appear to have been tabled at the AGM on 10 September 2014.

[218] Mr Bass also located a copy of both versions in Ms Burrows P:/drive. Ms Burrows told the Commissioner that the document was widely distributed to Board and Trust members and discussed with staff.

[219] Ms Burrows advised that she had sent the 3 column version to a lawyer acting for Board members and that the lawyer had met with sub-committee members at her law practice. Ms Burrows provided a copy of the email showing the document being

forwarded. Ms Burrows also provided the document to members of the Board at the time.

[220] The Commissioner found that it was unlikely the lawyer or others involved in the sub-committee referred to by Ms Burrows were the source of the TVNZ documents. The Commissioner did not speak to any other person about this document or its whereabouts.

#### Document 5 - Rangiora High School Education Trust Applications for Funding

[221] This was a table recording applications to the Education Trust for funding. Mr Bass located a hard copy of this document in the Education Trust folder stored in Ms Horne's office and an electronic copy of the document was also found in Ms Horne's P:/drive.

[222] Mr Bass concluded that this document had been added to after the final meeting of the Trustees on 15 October 2014. The final entry is dated 26 November 2014. Mr Bass concluded the only two people who had access to the TVNZ version were Ms Burrows and Ms Horne, although the document was not found on Ms Burrows' P:/drive. Mr Bass also found that members of the senior leadership team could see the document as part of the professional development budget.

[223] Ms Burrows told the Commissioner that at a previous Board meeting the Board had resolved to second three Board members onto the Trust. Ms Burrows explained that the document was kept by the Trust secretary and updated by the Trust secretary and herself. Ms Burrows advised that because the document was a public document it would be provided to anyone who asked to see it. Ms Burrows explained that the information is of great interest because to receive funding requires a lot of input from those applying. They are required to put in a proposal and a CV and any use of funding is always followed by a written report that is published through the Board.

[224] Ms Burrows told the Commissioner that the document would have been updated for the meeting which was due to take place on 27 November 2014. Ms Burrows also advised the Commissioner that when Ms Val Tones, Executive Officer, had been compiling document 11 for Mr Rondel, she would have discussed the

document with Ms Horne as it would have contained information relevant to the information being compiled for Mr Rondel.

[225] The Commissioner found that while the document was located in Ms Horne's office and P:/drive the document was available to Ms Burrows and did not accept that the document had been sourced from others who had asked for it as suggested by Ms Burrows.

[226] The Commissioner did not make any enquiries with any other staff members regarding their access to the document even though others acknowledged being able to access it and acknowledged working at the school during the period the Commissioner believed the documents had been collated.

#### Document 6 and 7 - Rangiora High School Education Trust Annual Staff Scholarship and Reminder Notice

[227] Document 6 was a document seeking applications from staff for Study Award proposals and was dated 2013. Document 7 was an older version of a reminder for applications to be made for funding assistance and/or an annual staff scholarship from the Education Trust dated 2010.

[228] The two documents were referred to together in the Bass Report. He found that the TVNZ version of the documents did not show any signs of being hole punched as per the archive documents. Both documents were contained on Ms Horne's P:/drive.

[229] The Commissioner found that Documents 6 and 7 were widely distributed and that they would have been available to Ms Burrows. The Commissioner accepted that others would also have had the documents available to them.

#### Document 8 - Response to Workplace Bullying concerns raised in 2014

[230] This was an official response from the School to workplace bullying concerns prepared by Ms Burrows. Mr Bass says that the TVNZ version of this document is a changed and updated version of the School's official response tabled at a meeting on 17 April 2014.

[231] Ms Burrows denied having a copy of the TVNZ version of this document but accepted that the document was confidential. Ms Burrows told the Commissioner that the TVNZ version is in a different font than she would use and was not a font used at the school. Ms Burrows says that the version on her P:/drive was not the same as the TVNZ version.

[232] The Commissioner found that the document was a highly confidential document found on Ms Burrows P:/drive. While the TVNZ document was in a different font and included additional information to the document found on Ms Burrows P:/drive, the Commissioner found that Ms Burrows was the person who updated the document and that she was the source from which the document was distributed to TVNZ.

[233] The Commissioner did not accept Ms Burrows' explanations that the document had been provided to Board members. This finding is inconsistent with the email trails Ms Burrows provided to the Commissioner which shows the document was provided to Mr James who was the Chairman of the Board at the time.

[234] The Commissioner's findings ignore the fact that there were other members of the senior leadership team who had copies of the document sent to the Ministry and that NZSTA personnel also had a copy of the document. The Commissioner did not investigate beyond the report Mr Bass provided and has provided no reasons to support her conclusion that Ms Burrows put together the document provided to TVNZ.

#### Document 9 - Letter to the Board regarding Farm Land Purchase

[235] Document 9 was a letter on school letterhead relating to the farm purchase dated 12 December 2011. There were three different versions of the letter. Mr Bass found a copy of the TVNZ version of this document on Ms Burrows' P:/drive and noted that the document had been accessed electronically on 10 April 2015. He could not locate a copy in the Board archives and the version of the document in the possession of Board members differed from the TVNZ version.

[236] Ms Burrows accepted that she accessed the document on 10 April 2015. Ms Burrows said she accessed the document as part of her preparation for the Dr Grainger investigation that was, at that time, ongoing.

[237] Ms Burrows told the Commissioner that the document was widely distributed on a number of occasions and formed part of the documentation she had provided to Ms Karen Sewell and which had been tabled/circulated at a Board meeting attended by a member of the NZSTA.

[238] The Commissioner found Ms Burrows explanation that the document was given to Board members, did not account for the fact that it appeared from the Bass Report that the TVNZ version was not the one that was given to Board members. The Commissioner found that there were subtle changes to the document and noted that the version given to TVNZ was not found on the Board's file.

#### Document 10 - Letter from Solutions & Services to the Principal

[239] This was a letter dated 28 April 2010 from Solutions & Services. A copy of this document could not be located even though it was addressed to the Principal.

[240] Ms Burrows told the Commissioner that this document had been tabled during the public excluded session of the Board meeting held on 29 April 2010.

[241] The Commissioner found that the document was addressed to Ms Burrows and that it was received in 2010. The Commissioner found it was not likely to have been retained and retrieved by any Board member to whom it may have been distributed in 2010.

[242] The Commissioners findings are inconsistent with the finding in the Bass Report that it was possible that two former Board members including Mr James had possession of a copy of the documents. The Commissioner did not undertake any further inquiries in this regard.

#### Document 11 - Rangiora High School Overseas Trip Expenses Summary 2012 – March 2015

[243] This document was authored by Ms Tones who provided it to Ms Burrows on or about 30 March or 1 April 2015. The document records overseas trip expenses from 2012 to March 2015. The electronic record is saved on the G:/drive. A copy was also provided to the Commissioner on 1 April 2015 during a Finance meeting.

[244] Ms Burrows told the Commissioner that she did not have restricted access to this document as it was in the G:/drive. Ms Burrows told the Commissioner that the document was also discussed with others and it sat on her desk for some time.

[245] The Commissioner did not accept Ms Burrows' explanation that the source of the document could have come from someone else accessing it on the school G:/drive and found that the document had been sourced from Ms Burrows.

### ***The Commissioner's investigation***

[246] The Commissioner notified Ms Burrows on 5 June 2015 that she had considered the Bass Report and had determined a disciplinary investigation under clause 6.3 of the collective agreement would be commenced. As set out earlier, events intervened and the disciplinary investigation by the Commissioner was not undertaken until early 2016.

[247] Following the disciplinary investigation the Commissioner concluded that Ms Burrows, either by herself, or in collaboration with someone else, collated and then disclosed the documents to TVNZ. The Commissioner believed the motivation for Ms Burrows in disclosing the documents was to answer the allegations made in the TVNZ article which aired on 8 April 2015.

[248] The Commissioner's reasons for her finding were:

- a) The material was collated in a short time period.
- b) The time period encompassed the school holidays and while some of the senior leadership team had not been at the school Ms Burrows had acknowledged being at the school at that time.
- c) The person who collated the documents had access to confidential material and the letter raises issues that would not have been widely known such as the cost of the intervention.
- d) A Board member would not have had access to documents spanning 2010 to 2015.

- e) No one else could have accessed documents on Ms Burrows computer or the Executive Officer's computer unless they accessed at a time when both Ms Burrows and the Executive Officer were absent; had knowledge of where the documents were stored; had access to Ms Burrows and the Executive Officer's passwords and had a strong motivation to act in this way.

[249] The Commissioner did not reach any conclusions regarding the letter which accompanied the documents. As part of the disciplinary investigation, on 28 January 2016 Ms Burrows provided a full response to the Bass Report. Included in this response was an email dated 9 April 2015 which was sent at 9.03am to TVNZ. This was the morning immediately following the article being aired on TVNZ. The email was sent by Ms Julia Arden, Homestay Co-ordinator for the School. Her email supported Ms Burrows and included the following paragraph:

You are a pawn in a personal vendetta being effectively waged against [Ms Burrows] by a small number of disaffected and vitriolic people whose ambition is to bring her down.

[250] The letter which accompanied the documents sent to Mr Parkin on 14 April 2015 had, remarkably, the exact same wording. In answer to my questions of the Commissioner at the investigation meeting, she was unable to explain why she had not interviewed Ms Arden as one of the possible collaborators in collating the documents. The Commissioner told me that she did not pick up the level of detail which would have alerted her to the similarities in the wording of the email dated 9 April 2015 and the anonymous letter.

[251] Despite Ms Burrows requesting copies of full information to enable her to be able to respond in more detail to the Bass Report, she did not receive, and neither did the Commissioner, copies of the interview notes made by Mr Bass during his investigation. The interview notes were not appended to his report and only came to light during my investigation into Ms Burrows' claims.

#### *Accessing Ms Burrows' computer*

[252] As part of the investigation into the TVNZ documents, the Commissioner instructed Mr Bass to clone the three computers used by Ms Burrows, Ms Cleary and

Ms Horne. This was discussed with Ms Burrows at a meeting on 29 April 2015. Ms Burrows raised concerns about confidential information contained on her laptop. Following a discussion with her lawyer by telephone Ms Burrows agreed to retrieve the laptop from her home and return it to the school and lock it away in a filing cabinet drawer. Ms Burrows is recorded as stating (verbatim):

Well I think, um, what would be a good idea then is that, um, if we take the computer and we lock it in a, um, filing cabinet and then we put the key in a place where obviously no one will have access to it. So nothing happens with the computer. I would feel happy about that because then no allegation can be made that I tried to do anything with it once I went to get it.

[253] Mr Bass's response seemed quite relaxed about further access of the computer. He told Ms Burrows that it was very difficult to delete files from a laptop permanently and it was not really a risk factor because it would be recoverable. Mr Bass advised Ms Burrows that if she felt comfortable she could lock the computer in her cupboard and put the key in her pocket but there was no real issue as to who had the key because the hard drive was recoverable, as long as it was the same computer.

[254] Written confirmation of the requirement that Ms Burrows hand over her laptop and hard drives including any removable hard drive storage device was provided to Ms Burrows after the meeting had ended.

[255] After retrieving the laptop and returning to the School Mr Bass accompanied Ms Burrows while she locked the laptop in her office cupboard as agreed. After Mr Bass had left Ms Burrows retrieved the laptop, opened it and viewed some files.

[256] The Commissioner told me the letter issued after the meeting and dated the same date (29 April 2015) constituted a clear instruction not to access the laptop. I do not agree. The letter sets out an instruction to Ms Burrows that she is to hand the computer and all electronic devices over to Mr Bass but does not instruct Ms Burrows not to access the information on the laptop.

[257] At the time the Commissioner confirmed her instruction to Ms Burrows the parties were still in discussion about how the confidential information contained on the laptop would be identified and then treated. That was to be discussed further the following day.

[258] Ms Burrows acknowledged that she accessed her laptop and opened files relating to her PhD studies, after agreeing not to and during the investigation by Mr Bass told the Commissioner that she was not thinking clearly at the time but had no intention of tampering with files and it was an innocent act on her part.

[259] The Commissioner held that Ms Burrows was given a lawful direction not to access her laptop and that Ms Burrows fully understood that direction and the need for it. Certainly the evidence shows that Ms Burrows understood the reason why the laptop needed to be locked away however, I am not satisfied the Commissioner issued a clear direction not to access the laptop.

### ***18 February 2015 Board Minutes***

[260] During a weekly meeting on 11 March 2015 the Commissioner raised concerns with Ms Burrows about the minutes taken on 18 February 2015. Of concern to the Commissioner was that the minutes were incomplete and did not record any discussion or details about amendments of the Principal's delegations of authority. Ms Burrows advised the Commissioner that the minutes were taken by a temporary secretary as Ms Horne was away sick. Ms Anne Johnston of CES undertook the secretarial function for the Board meeting including typing up the minutes.

[261] In addition the Commissioner had concerns that Board papers accompanying the minutes had hand written amendments that were not countersigned and the resolution to pay money into the lawyers trust account had not been recorded. Both the Commissioner and Ms Burrows considered the minutes to be unreliable.

[262] The Commissioner drafted an addendum to the Board Minutes in which she records the following inaccuracies contained in the 18 February 2015 Board minutes:

- The recorded minutes referring to L Newsome resignation appear in the original minutes as supplied to the commissioner by the Board secretary as occurring in the public section. This has been verified by the chair and the trustee concerned. It does not note an embargo in the contents of the letter was agreed to at the time
- The above was discussed with the Principal at a meeting of 13<sup>th</sup> May routine meeting
- Of concern a copy of the minutes provided to the commissioner on Wednesday 27<sup>th</sup> May by the Principal (pink paper) had the resignation recorded in more detail and in the public excluded section.

[263] The Commissioner sets out further concerns about incomplete motions/records in the following terms:

- Decisions made by Board were incorrectly recorded with the Principal moving motions relating directly to her own employment
- Motions “as amended” were agreed but without recording what the amendments were
- Very minimal records of discussion/information supplied or process to support [decisions]

[264] In the letter advising Ms Burrows that a formal disciplinary investigation would be undertaken the Commissioner set out the concerns she wished to address which included an allegation that Ms Burrows had presented Board minutes to her for signing off as correct when Ms Burrows was aware they were not correct. The Commissioner refers specifically to the resignation of Ms Leanne Newsome. The Commissioner states that the minutes record Ms Newsome’s resignation and statement as being delivered in the public excluded portion of the meeting when in fact it was delivered in the public included portion.

[265] At the disciplinary meeting on 29 January 2016 Ms Burrows denied altering the minutes of the meeting. Ms Burrows explained that the minutes of the meeting were taken by Ms Johnston. The minutes produced by Ms Johnston show that a discussion relating to the resignation of Ms Newsome occurred in the public part of the meeting and those minutes were typed on the school computer at Ms Horne’s workstation.

[266] The Commissioner advised Ms Burrows that her investigation showed that the minutes were amended on 23 February 2015 and were accessed on 9 March 2015. It was the Commissioner’s view that the minutes had been significantly altered with changes of importance including the discussion regarding the Newsome resignation which was changed to indicate it had been conducted “*in Committee*”. A further amendment was the addition of an action table.

[267] Ms Burrows was asked to explain and comment on a number of questions set out by the Commissioner. The questions largely related to who typed and provided the minutes from the 18 February Board meeting.

[268] Ms Burrows provided a written response to the Commissioner's questions on 25 February 2016. Ms Burrows was adamant that Ms Johnston and Ms Horne had been responsible for the minutes and that her only involvement was in receiving a copy. Ms Burrows advised that she had, at all times, considered the complete minutes to be inaccurate but maintained that the resignation of Ms Newsome was first raised in the public section of the meeting and then discussed further in the public excluded section because of the issues facing the Board. Ms Burrows says it was at the end of this discussion during the public excluded section of the meeting that the Board regretfully accepted Ms Newsome's resignation.

[269] The Commissioner found that Ms Burrows had asked her to allow the record to state that Ms Newsome's resignation was "*in committee*" when it was not and that Ms Burrows had confirmed that the minutes were not correct. The Commissioner found that Ms Burrows wished to mislead her into thinking the minutes were correct and it was appropriate for them to be signed off. The Commissioner found that presenting incorrect minutes and asking for them to be signed off amounted to serious misconduct.

### **Was the dismissal justified?**

[270] Section 103A(3)(a) of the Act requires the Authority to address the resources available to an employer to deal with matters that may lead to dismissal from employment of an employee. The Authority is required to recognise that the degree of adherence to standards will depend upon the resources reasonably available to the employer.

[271] The Commissioner had access to, and utilised, significant resources including the advice and assistance of the NZSTA, independent legal advice and Ministry advice. Despite access to these resources the Commissioner has failed to investigate the allegations against Ms Burrows sufficiently.

[272] In reaching her conclusions the Commissioner has relied entirely on the investigation and report by Mr Bass. While some delegation by the decision-maker will not necessarily render a dismissal unfair; it is the extent of the delegation that is relevant.<sup>6</sup>

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<sup>6</sup> *Timu v Waitemata District Health Board* [2007] ERNZ 419.

[273] As set out in the following paragraphs there were a number of matters which the Commissioner needed to be satisfied about in order to reach her conclusions that Ms Burrows had acted in a way that amounted to serious misconduct. In *Timu* the Court held a dismissal to be unjustified because of the employer's failure to take readily available steps to clarify and resolve conflicting information.

[274] In [\*Lavery v Wellington Area Health Board\*](#)<sup>7</sup> the Court held that it is important that the employer carries out its own investigation and does not rely on an inquiry undertaken by a third party. The Court held that a report does not absolve the employer from carrying out its own investigation, and it should have done so because the inquiries were essentially different.

[275] The report in *Lavery* was aimed at the general standard of medical and nursing care provided to a patient, and this was separate from any conclusion as to the grievant's misconduct within the employment relationship. The employer's failure to mount its own inquiry meant that the employer could not have reached, and therefore did not reach, an honest belief that the grievant had been guilty of any misconduct.

#### ***Disclosure of TVNZ documents***

[276] In respect to her findings relating to the disclosure of the TVNZ documents the Commissioner has reached conclusions which in a number of instances are inconsistent with those reported in the Bass Report. Further, Mr Bass has only provided in his report his summarised conclusions regarding the involvement or otherwise of those he interviewed.

[277] I agree with the submissions made on Ms Burrows behalf that in order to ensure no further enquiries were needed, the Commissioner was required to properly assess the accuracy of the observations and conclusions recorded in the Bass Report. The Commissioner was unable to undertake that assessment as she did not receive all of the interview notes.

[278] In his report Mr Bass states that he asked Mr Newbury, who had been a Board member since 2007, if he had any comments to make regarding the anonymous letter and who may have authored it. Mr Bass records that Mr Newbury stated that the sentiments set out in the letter had been conveyed a number of times but he refused to

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<sup>7</sup> [1993] 2 ERNZ 31.

say anything further as the conversations were legally privileged in that the comments had been conveyed to a lawyer during a lawyers meeting.

[279] Mr Bass considered Mr Newbury's comments supported his premise that the discussions related to a meeting which took place on Sunday, 22 February 2015 at the offices of Wynn Williams with members of the Board. Ms Burrows was not present at this meeting. The Commissioner made no further enquiries of Mr Newbury regarding his comments.

[280] The staff representative on the Board was a person Mr Bass was instructed to interview. Mr Bass did not interview this Board member because he could not confirm an interview time with him. This information was recorded in his written report. The Commissioner did not follow up with the staff representative and seek any comments from him regarding the documents. The staff representative had access to a large number of the TVNZ documents but was never excluded as a person who could have collated and disclosed the documents or assisted in that process.

[281] During the disciplinary investigation the Commissioner spoke to a number of past Board members. No notes or other recordings were made of those discussions and the conversations were not disclosed to Ms Burrows during the disciplinary process. It is unknown whether the discussions the Commissioner had with the past Board members influenced her final conclusions.

[282] The Commissioner concluded that the TVNZ documents had been collated in a short time period following the airing of the article on 8 April 2015. Mr Parkin reported that the documents were given to him on 14 April 2015. The Commissioner believed the documents were collated in the period 9 – 14 April 2015. Ms Burrows acknowledged she attended the school during this period which was the school holiday period, but told the Commissioner she was out of the office for much of the time at various appointments. On Saturday, 11 April 2017 Ms Burrows attended her doctor due to becoming extremely unwell.

[283] Ms Burrows offered to account for the time she was at the school during the period 8-14 April 2015 but the Commissioner was satisfied with Ms Burrows' explanation that she was at the school on some occasion and did not wish to have the detail of the times she attended the school.

[284] In the spreadsheets appended to his report Mr Bass notes that five other staff members attended the school during the same period all of whom had access to some or all of the TVNZ documents. The Commissioner did not undertake any further enquiries with these five staff members about their attendance at the school during this period. Further enquiries may have included checking the photocopier log which is coded and checking who entered and exited the building and at what time.

[285] The Commissioner did speak to Mr Hays regarding document 2 but no notes of that discussion were made and the extent of any information he provided to the Commissioner was not made available to Ms Burrows.

[286] In the spreadsheets appended to his report Mr Bass notes that the school server was down on 8, 9 and 10 April 2015. The Commissioner did not check the times the server was actually down or whether it was down for the whole of the period 8 – 10 April 2015 or for only parts of the three days. At the investigation meeting Ms Burrows acknowledged that she had accessed her P:/drive on 10 April 2015 so the server was available for at least some of the time during that period.

[287] The Commissioner found that the person who collated the documents had access to confidential material and the anonymous letter raised issues that would not have been widely known such as the cost of the intervention.

[288] It was the Commissioner's evidence that the anonymous letter was not part of the disciplinary investigation. Further, at least two other employees at the school had access to the information regarding the cost of the intervention, including the staff representative on the Board and the Board secretary. The Commissioner did not interview either of these two people.

[289] The Commissioner found that a Board member would not have had access to documents spanning 2010 to 2015. This finding does not take into account that more than one person may have been involved in collating the documents. There is no evidence the Commissioner undertook any enquiries to satisfy herself that no other member of staff or past or present Board members could have been involved in collating the TVNZ documents.

[290] The Commissioner found that no one else could have accessed documents on Ms Burrows' computer or Ms Horne's computer unless they accessed them at a time when both Ms Burrows and Ms Horne were absent; had knowledge of where the documents were stored; had access to Ms Burrows' and Ms Horne's passwords and had a strong motivation to act in this way.

[291] There is no evidence the Commissioner considered whether Ms Horne may have been involved in the collation of the documents. Ms Horne was able to access Ms Burrows P:/drive and, as the Board secretary, knew where the documents were stored. Ms Horne was one of the staff members who had been at the school during the period 8 – 14 April 2015.

[292] Given the failures in the Commissioner's disciplinary investigation into the disclosure of the TVNZ documents the finding that Ms Burrows' conduct was serious misconduct was not a finding the Commissioner could make in all the circumstances.

#### ***Assessing of Ms Burrows' laptop***

[293] In relation to Ms Burrows accessing her laptop, medical records show that on 30 April 2015 Ms Burrows was suffering from serious health issues including anxiety, depression symptoms and the return of anorexia as well as tearful panic attacks that were occurring at the time. It was submitted on Ms Burrows' behalf that a fair and reasonable employer would accept this medical information as an explanation around why Ms Burrows would have accessed the PhD material out of a heightened anxiety at that time.

[294] I am not satisfied that the Commissioner gave Ms Burrows a clear instruction not to access her computer. The instruction from the meeting on 29 April 2015 was provided in writing soon after the meeting, and that instruction confirms that she was to hand over the laptop forthwith. There is no reference to Ms Burrows not accessing the laptop in the meantime.

[295] I am satisfied that Mr Bass and Ms Burrows were both of the same view that there was no specific instruction given to Ms Burrows not to access the computer and the arrangement in any event was quite informal.

[296] As highlighted by Mr Bass' conversation with Ms Burrows, accessing the computer was not identified as a risk factor given that anything deleted from any files

would be recoverable. Recovering deleted files is the very essence of a computer forensic investigation. I accept that the action by Ms Burrows of accessing her laptop after it had been locked away was the exercise of poor judgment.

[297] Viewed objectively, and in the absence of any evidence of a clear direction not to access the computer, a finding of serious misconduct could not be open to a fair and reasonable employer in these circumstances.

***18 February 2015 minutes***

[298] In relation to the 18 February 2015 minutes, my investigation established that there were two sets of minutes from this meeting. One set of minutes recorded the public session of the meeting, the second set of minutes was the record of the “*in committee*” section of the meeting. Both sets of minutes reference Ms Newsome’s resignation.

[299] The Commissioner gave evidence that she spoke with Mr Turnbull and Ms Newsome prior to commencing the disciplinary inquiry, but there were no notes made of those discussions and Ms Burrows did not have the opportunity to respond to what was discussed. In any event, Ms Newsome was not in a position to comment on what was discussed in the “*in committee*” session of the meeting as she was no longer a Board member and did not attend that part of the meeting.

[300] The Authority had the benefit of hearing from witnesses who were not interviewed by the Commissioner during her disciplinary investigation that have confirmed that Ms Newsome’s resignation was given in public, but that there was also a discussion about her resignation in the “*in-committee*” part of the meeting. The Minutes produced for the Commissioner’s sign off accorded with the recollection of the meeting of witnesses I interviewed including Ms Sheppard.

[301] I am not satisfied the Commissioner undertook a thorough inquiry into this aspect of the alleged serious misconduct. It would have been a simple matter for her to have discussed with each of the Committee members who attended that meeting to confirm that the Minutes were in fact an accurate reflection of what had happened at the meeting or otherwise.

[302] I find the decision by the Commissioner that Ms Burrows’ actions in presenting to her minutes which the Commissioner viewed as misleading and amounted to serious misconduct was not a finding available to the Commissioner and

was not a conclusion an employer acting fairly and reasonable could reach in all the circumstances.

***Section 103A considerations***

[303] I have touched on the resources available to the Commissioner as required by section 103A(3)(a) and am satisfied that the Commissioner raised her concerns with Ms Burrows and provided Ms Burrows with a reasonable opportunity to respond before dismissing her. I am not satisfied the Commissioner genuinely considered Ms Burrows explanations and have found that the finding of serious misconduct in respect of each of the three areas of concern raised by the Commissioner was not open to her.

[304] The Act allows the Authority to consider any other factors appropriate, in addition to the factors set out in section 103A(3) of the Act.<sup>8</sup> In coming to my conclusions in this matter I have also considered whether the Commissioner:

- a) demonstrated bias and pre-determination in her decision making process;  
and
- b) acted in breach of the terms of the collective agreement.

Bias and predetermination

[305] Ms Burrows claims the Commissioner failed to be impartial in her investigation of the serious misconduct allegations and that the partiality arose as a result of the work undertaken by Ms Moore during her period as a Specialist Advisor and as a result of the information obtained by the Commissioner during her investigation of employment risks.

[306] Ms Burrows says this was recognised by the Commissioner when she notified Ms Burrows of her intention to appoint Dr Grainger to investigate issues which the Commissioner had become aware of in her role as Specialist Advisor. The Commissioner advised Ms Burrows that as her issues had been raised with the Ministry it was not appropriate for her to investigate those issues.

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<sup>8</sup> Employment Relations Act 2000, section 103A(4).

[307] When the Commissioner decided not to involve an independent person to undertake the disciplinary investigation she left herself open to the prospect of claims that her previous investigation clouded her judgment in the disciplinary process and when determining the outcome.

[308] When undertaking her role as Specialist Advisor the Commissioner met with and spoke to a number of previous Board members including those Ms Burrows has described as being hostile. Interview notes from those discussions were not kept and the content of the discussions was never put to Ms Burrows for explanation.

[309] In her letter to Ms Burrows on 7 March 2016 the Commissioner referred to a “...*pattern of [Ms Burrows] acting impulsively without any thought of the consequences of [her] actions.*” The Commissioner considered Ms Burrows’ “...*thought processes and judgment...*” to be unsound and she no longer had trust and confidence in her.

[310] I am satisfied that the information obtained in her discussions when acting as a Special Advisor has contributed to Ms Moore reaching an opinion adverse to Ms Burrows and that opinion has tainted the Commissioner’s views throughout the disciplinary process.

[311] I find that it is more likely than not, given the statements in her letter dated 7 March 2016, at least some of the information obtained as Specialist Advisor has influenced the Commissioner in her decision making process as Ms Burrows’ employer. Accordingly, an element of bias has been shown to be present and this may have led the Commissioner to have predetermined the outcome of the disciplinary process.

#### Compliance with the collective agreement

[312] Compliance with the provisions of the collective agreement are paramount. Ms Burrows claims the Commissioner has breached clause 4.3.2 and clause 6 of the collective agreement when she failed to appoint an independent person to undertake an impartial and objective assessment of the concerns relating to the TVNZ documents, Ms Burrows accessing of her computer and the 18 February 2015 minutes.

[313] The relationship between Ms Burrows and the Commissioner clearly had problems from the outset. Prior to her appointment as Commissioner Ms Moore had provided to the Ministry a report that contained adverse findings against Ms Burrows. Those adverse findings informed the decision by the Ministry to appoint a Commissioner.

[314] Three investigations were initiated by the Commissioner within six months of her appointment. Two of these investigations led to disciplinary processes being initiated. Ms Burrows submits that given the background to their relationship the Commissioner ought to have considered adopting the process envisaged by clause 4.3.1 of the collective agreement prior to initiating the disciplinary investigation which led to her dismissal.

[315] I accept the Commissioner's submissions that clause 4.3.1 allows for an independent person to facilitate or mediate problems in the working relationship between the Principal and the Board, but does not relate to disciplinary investigations.

[316] The Commissioner was required under section 6.1.1 of the collective agreement to initiate informal discussions prior to formally commencing a disciplinary process. I am satisfied the Commissioner has failed to undertake her obligations in this regard in relation to the two disciplinary processes initiated by the Commissioner firstly on 3 May and then on 5 June 2015.

[317] There was no evidence of any informal steps taken to attempt to resolve the issues raised by Dr Grainger in her report before the Commissioner initiated a disciplinary process in relation to those issues on 3 May 2015. As noted earlier those issues are still pending formal investigation.

[318] The Commissioner told me that the meeting held on 3 June 2015 (two days prior to the Commissioner's formal advice that she was implementing a disciplinary process) was her attempt at an informal resolution of her concerns regarding the disclosure of the TVNZ documents, Ms Burrows accessing her computer and the 18 February 2015 minutes.

[319] I am not satisfied the 3 June 2015 meeting meets the requirements of clause 6.1.1(a) of the collective agreement. The minutes of that meeting record the Commissioner advising Ms Burrows that the purpose of the meeting was to discuss:

- a) Dr Stewart's Report – this had been finalised and was being put in a ring binder for Ms Burrows and was delivered to her during the meeting;
- b) The analysis of variance which required some corrections; and
- c) The Bass Report – this was an opportunity for Ms Burrows to make any informal comments or explanations she had regarding the findings of the report.

[320] The minutes from the meeting do not record any discussions about resolving the Commissioner's concerns. Rather the minutes record discussions which focus on receiving Ms Burrows' explanations. This was not an informal discussion with the purpose of resolving the Commissioner's concerns in an informal manner.

[321] The failure by the Commissioner to initiate informal discussions with Ms Burrows in an attempt to resolve matters in an informal manner is a breach of the collective agreement.

### **Determination**

[322] For all the foregoing reasons, I have concluded that a fair and reasonable employer could not have dismissed Ms Burrows in all the relevant circumstances at the time that this occurred. Ms Burrows was unjustifiably dismissed and is entitled to a consideration of remedies.

### **Remedies**

[323] The remedies Ms Burrows is seeking are reinstatement, reimbursement of wages, compensation and a contribution to costs.

### ***Reinstatement***

[324] An important aspect of Ms Burrows' claim is her application for reinstatement. Ms Burrows is seeking vindication having committed about 34 years of her professional life to education, with the last 13 as Principal of the School. I heard evidence from a number of past Board members, staff and parents of the School recognising Ms Burrows as someone who has contributed a great deal towards the outcome for students at the School.

[325] The application is opposed by the Commissioner on the grounds that Ms Burrows will not be able to establish an effective working relationship with the Commissioner, the senior leadership team or with the Ministry. The Commissioner has indicated there continue to be outstanding allegations of misconduct that require investigation and determination. Further, Ms Burrows has not been in the workplace since June 2015. Since that time the School has adopted a different strategic direction which the Commissioner believes Ms Burrows will not engage with.

[326] Section 125(2) of the Act requires the Authority to be satisfied that reinstatement of an unjustifiably dismissed employee is both reasonable and practicable.

[327] The Court of Appeal has confirmed that the main principles to be applied when determining practicability are:<sup>9</sup>

- The onus is on the employer to establish that reinstatement is not practicable.
- Practicability is not the same as possibility. What is possible is not necessarily practicable.
- The interests of the parties and the justice of their cases are to be balanced with regard to the past but also and in particular the future.
- Practicability involves considering whether the employment relationship can be successfully re-imposed on the parties.
- The Authority may consider matters that were outside the reasons for a dismissal when assessing whether the employment relationship can be re-imposed. A broad approach is to be taken.

[328] The test of “reasonableness” was considered by the full Court in *Angus v Ports of Auckland Limited*<sup>10</sup> where the Court stated:

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<sup>9</sup> *New Zealand Education Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416-417.

...the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

...

... The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, for others, for example affected health care patients in institutions.

[329] As held by the Court in *Howard v Carter Holt Harvey Packaging Limited*<sup>11</sup> Ms Burrows must accept that a resumed employment relationship will involve both parties demonstrating trust and confidence in each other.<sup>12</sup> Ms Burrows says that even though the Commissioner has an adverse view of her, she believes she can work with the Commissioner on a short term basis while arrangements are made for the election of the new Board and therefore reinstatement is practicable. This is a different view to that expressed by Ms Burrows on 19 June 2015 when Ms Burrows expressed her opinion that the relationship between herself and the Commissioner was one of mistrust.

[330] Ms Burrows seeks reinstatement due to negative publicity that surrounded her suspension and dismissal. Ms Burrows has been largely involved in a significant amount of the publicity surrounding her suspension and dismissal. Ms Burrows established a public Facebook page in which numerous posts were made by her setting out the history of her employment, her dismissal and many details of these proceedings.

[331] Ms Burrows also authorised an advertisement in the Northern Outlook newspaper in relation to these proceedings, featuring her photograph and links to the Facebook page and a petition available at [change.org](http://change.org).

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<sup>10</sup> Above n 3 at [65] – [66] and [68].

<sup>11</sup> [2014] NZEmpC 157.

<sup>12</sup> *Ibid* at [84].

[332] In addition to the Facebook postings Ms Burrows published an article on her LinkedIn site with a chronology of the entire history of this matter from Ms Burrows perspective.

[333] Ms Burrows had support from members of the School community which included handing out flyers to children of the School in a format that was very similar to the advertisement that Ms Burrows had authorised. When handing out the flyers a supporter, Mr Finch, approached a female student who had previously survived a particularly difficult situation. Ms Burrows was contacted by the School and advised the student had become frightened and the Police were also advised. Following this notification Ms Burrows posted comments supporting Mr Finch.

[334] The Commissioner had previously made Ms Burrows aware of her concerns regarding the public comments by Ms Burrows. On 2 March 2016 the Commissioner wrote to Ms Burrows raising concerns about a cartoon depicting the Commissioner as an executioner with the words “...*the axe has fallen...*”, and about Ms Burrows writing to the Prime Minister and the Minister of Education. At the time Ms Burrows posted this cartoon she was still on paid suspension and had not been dismissed.

[335] Following her dismissal Ms Burrows posted on Facebook the following statements [verbatim]:

The latest bit of cruelty in the story of my wrongful dismissal; 37 years of my life couriered to me this morning by the Commissioner. Its like they didn't know me very well and I died and someone had to pack me up and send me to my family.

I wonder why more people don't fight this sort of **bullying and injustice**.

[336] The Acting Principal, Ms Julia Malcolm, gave evidence that she had consulted with Ms Burrows as to the form in which her belongings would be sent to her. Ms Burrows and Ms Malcolm had enjoyed a close working relationship prior to Ms Burrows' dismissal. After contacting Ms Burrows about the return of her belongings, Ms Burrows advised Ms Malcolm that she wished to have them couriered to her. The day for the delivery was arranged with Ms Burrows.

[337] Ms Malcolm became aware of the Facebook post and felt it was not an accurate reflection of the careful efforts she had gone to, to handle the return of Ms Burrows' property. Ms Malcolm told me that this is a contributing factor in making it

difficult for her to establish a working relationship with Ms Burrows if she is returned to the School.

[338] Ms Burrows had also failed to distance herself from other social media posts from her supporters. One such post reads:

Like everything this untrustworthy Commissioner has done...this is just incredibly shabby, low, totally undeserved & absolutely no way to treat a servant of our College after 13 years ... we just don't want her crap on our doorstep ... fight this Peggy ... not because of this low life ... but because this is totally inappropriate ... like everything else this MOE stooge has done...

[339] Ms Burrows commented on this post a few minutes later and did nothing to distance herself from the comments.

[340] I am satisfied that Ms Burrows will find it difficult to establish a working relationship with the Ministry based on evidence of postings made on social media. Ms Burrows posted on Twitter distasteful comments relating to the Honourable Hekia Parata and referred to the Ministry in derogatory terms in a Facebook post.

[341] Further, I am not satisfied Ms Burrows will readily establish a working relationship with her senior leadership team. A Principal is expected to have the trust and confidence of the senior leadership team as they are required to work together to provide the School's leadership. Every permanent member of the senior leadership team give evidence that they do not wish to work with Ms Burrows again.

[342] The evidence shows that the senior leadership team have been engaged in the drafting of a new school Charter, which changed the strategic direction of the School. The evidence from all members of the senior leadership team was to the effect that Ms Burrows would not be willing to work within a Charter she had not drafted.

[343] Each of the senior leadership team members spoke about Ms Burrows' unpredictable moods and reactions. There was evidence that they spent a significant amount of time and energy affirming Ms Burrows, particularly in relation to her relationship with the Board. Ms Burrows says the senior leadership team's responses to her application for reinstatement was due to them having to deal with her health issues, however this evidence was not corroborated by the members of the senior leadership team.

[344] The senior leadership team members had serious concerns about Ms Burrows relationship with the Board and their relationship with her. Some members of the team gave compelling evidence that Ms Burrows was a difficult person to work with and some were fearful of repercussions having given evidence at my investigation meeting. I heard compelling evidence of Ms Burrows being tearful, yelling and slamming doors in relation to discussions regarding Board matters and leadership team meetings being dominated by feedback on what the Board were doing rather than focussing on the educational issues affecting the School.

[345] I heard uncontested evidence that Ms Burrows could be emotional, unpredictable and erratic after a Board meeting which would result in long and stressful senior leadership team meetings. The overriding evidence was that the senior leadership team had no trust in Ms Burrows and did not wish to work with her again.

[346] There is a history of dysfunctional relationships between Ms Burrows and the School's Board. My finding of unjustified dismissal does not mean that there were not significant problems which required careful management. I am not satisfied that as a matter of practicality good working relationships with the Commissioner or the senior leadership team could readily be established. This militates against the making of an order. Accordingly, Ms Burrows application for reinstatement is declined.

### ***Lost wages***

[347] Ms Burrows seeks reimbursement of lost wages and other benefits since her dismissal. The amount has not been quantified. Having established that she was dismissed unjustifiably Ms Burrows is entitled to a minimum of three months' remuneration which was lost as a consequence of her dismissal, or if her actual loss was more, the lesser of these two figures.<sup>13</sup> In addition, the Authority has the discretion to award greater compensation for remuneration lost than three months' equivalent.<sup>14</sup> In Ms Burrows case there is no doubt that her actual remuneration loss exceeded three months' loss.

[348] Ms Burrows was paid two months' pay in lieu of notice. This means Ms Burrows was paid until 7 May 2016. Ms Burrows has lost a total of eight months

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<sup>13</sup> Employment Relations Act 2000, section 128(2).

<sup>14</sup> Ibid sections 123(1)(b) and 128.

remuneration. If I wish to extend the award of lost remuneration to more than the three months' I must have regard to any counterfactual analysis and whether, but for the unjustified dismissal, Ms Burrows would have retained her position as Principal at the School.

[349] As set out earlier, a disciplinary investigation relating to the findings of Dr Grainger's report was advised to Ms Burrows but never completed as other events intervened. Also, after Ms Burrows was dismissed further questions were raised with respect to financial matters discovered after an audit of the financial accounts. The outcomes of these two matters would not necessarily have led to findings of serious misconduct. Accordingly, I do not consider that dismissal would necessarily have occurred within the period which ran from the date when remuneration ceased to the date of this determination.

[350] Ms Burrows is to be paid the equivalent of eight months' remuneration including any KiwiSaver contributions and benefits (including her employer's) for that period. The parties are invited to settle between them the amounts involved. If they are unable to do so within the period of 28 days of the date of this determination, leave is reserved for Ms Burrows to apply to the Authority for the amounts to be fixed.

### ***Compensation***

[351] Ms Burrows seeks total compensation of \$60,000 being \$30,000 for the unjustified disadvantage claims and \$30,000 for the unjustified dismissal claims. Ms Burrows was largely unsuccessful on her claims for unjustified disadvantage. I have found that Ms Burrows was unjustified in one area of her employment situation which requires the consideration of a remedy. Accordingly, I have approached the question of compensation on a global basis.

[352] I am satisfied that the unjustified action and unjustified dismissal had an effect on Ms Burrows. The stigma associated with a finding of serious misconduct against her as a professional occupying a role which interfaces with the community was profound. It is not surprising that dismissal as a school Principal for serious misconduct has embarrassed and humiliated Ms Burrows significantly.

[353] The assessment of a monetary sum to compensate for those consequences is not an exact science. In all the circumstances of this case I am satisfied that a global award of \$20,000 is appropriate.

### ***Contribution***

[354] Section 124 of the Act requires me to consider the extent to which Ms Burrows' actions contributed towards the situation that gave rise to the personal grievances, that is the unjustified action and the unjustified dismissal.

[355] I find Ms Burrows conduct was not a factor in the unjustified action when the Commissioner disclosed the content of her Specialist Advisors Report and the second opinion from the Ministry regarding the use of the farm land funds to the senior leadership team without Ms Burrows' involvement or knowledge.

[356] Neither was Ms Burrows' conduct a factor in the Commissioner's decision that Ms Burrows had conducted herself in a way that constituted serious misconduct with respect to the release of the TVNZ documents, or the 18 February 2015 minutes.

[357] Ms Burrows did access her computer in circumstances where she had agreed not to do so and understood the reasons why that should not happen. However, I find her conduct in doing so was not so blameworthy that remedies should be reduced.

[358] The Commissioner submitted that Ms Burrows pre and post-employment conduct relating to her use of social media should be taken into account when assessing remedies. I have taken that information into account when assessing whether or not to order Ms Burrows' reinstatement, but will not impact on the quantum of the monetary remedies awarded to her.

### **Costs**

[359] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Burrows shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Commissioner shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[360] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority