

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 254
5429900

BETWEEN

MARLENE CAMPBELL
Applicant

A N D

THE COMMISSIONER OF
SALFORD SCHOOL
Respondent

Member of Authority: M B Loftus

Representatives: Fiona McMillan, Counsel for Applicant
Diccon Sim and Isabella Broadbent, Counsel for
Respondent

Investigation meeting: 10 December 2013 at Dunedin

Submissions Received: At the investigation meeting

Date of Determination: 11 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 1 November 2013 the applicant, Ms Campbell, was suspended from her position as Principal of Salford School.

[2] She seeks interim reinstatement pending a substantive consideration of her claim the suspension was unjustified.

[3] It should be noted the School has been under various forms of management during the time of events leading to the suspension. It was initially managed by a Board of Trustees elected under the Education Act 1989. On 5 November 2012 a Limited Statutory Manager (LSM), Mr Peter Macdonald, was appointed. An LSM has, as the name suggests, limited powers and operates in conjunction with the Board,

which remains. On 7 November 2013 a Commissioner, Ms Nicola Hornsey, was appointed. A Commissioner replaces a Board and exercises all the powers thereof (sections 78N and 78O of the Education Act).

[4] Ms Hornsey chose to continue the suspension.

Background

[5] Ms Campbell was appointed Principal of Salford School in 2006. She says her resolution of pre-existing issues made her unpopular with some staff.

[6] A regular Education Review Office (ERO) review was scheduled for 2012. On the second day Ms Campbell was advised she was the subject of anonymous complaints and the ERO would address those as part of its process but refused her request she be given details. The School claims Ms Campbell was given the details, though identities were hidden.

[7] The ERO recommended the Board investigate further and Mr Cleave Hay was appointed for that purpose. His report, delivered in September 2012, identified issues of concern with Ms Campbell's management style and recommended the Board *place performance improvement strategies and measurements in place*. It also recommended they consider their ability to do so and whether they should obtain outside assistance by, for example, requesting an LSM.

[8] Correspondence followed with Ms Campbell portraying hers as an attempt to identify and resolve issues without the involvement of lawyers. The School portrays her response as a denial of allegations she incorrectly claims lack specificity. Irrespective of which is correct, the result was a request from the Board the Ministry of Education appoint an LSM. It did, Mr Macdonald.

[9] Ms Campbell contends Mr Macdonald decided to remove her almost immediately. Mr Macdonald denies the allegation and says he interviewed all staff and Board members, both individually and in groups. He says:

... while some comments were supportive of the school's leadership, the overwhelming impression that I received was that both the ERO and the Cleave Hay report reflected accurately the low morale and climate of fear that existed in the school.

[10] On 12 December 2012 the Board and Ms Campbell met to discuss the issues but not long before (6 December 2012) Mr Macdonald received another complaint concerning Ms Campbell's treatment of a staff member on 31 May 2012. That was a source of additional angst and disagreement between the parties.

[11] There then followed various interactions between Ms Campbell, Mr Macdonald and the Board which she portrays as harassment and an undermining of her authority. The School denies the allegations.

[12] In June 2013 and while the above interactions were continuing, the Board conducted a staff survey. The Board says it was surprised and extremely disappointed with the results. They show some staff happy with, and supportive of, Ms Campbell but six of the 16 were actively seeking alternate employment. There was also commentary that concerned the Board. Ms Campbell says, aside from the fact she was only given a summary and not full details, the survey did not reflect many positive developments in the school and chose to emphasise the negative.

[13] It was around this time Ms Campbell decided she had had enough and on 16 July 2013 she raised a personal grievance. The grievance was mediated mid-September but no resolution achieved.

[14] Ms Campbell claims the Board used her grievance as an excuse to further exacerbate the situation by reconsidering the previous year's issues. She says it was another attempt to undermine her authority. The School denies the allegation. It portrays it as another step in a continuing process and claims the goal was to establish the cause of existing issues so they may be addressed.

[15] The investigation was primarily conducted by the Board's chair and a solicitor from a law firm engaged for both that purpose and to represent the school in the personal grievance. There are serious differences between the parties over what was investigated, how and why. About that there are many pages of correspondence.

[16] On 25 October the process claimed a casualty with the resignation of the Board's Chair. She states she did so as a result of what she heard during the investigation and that the knowledge gleaned had robbed her of the ability to deal objectively with Ms Campbell. The chair's resignation was followed by others and the entire Board had gone by the end of the month. Again there is disagreement over what prompted the resignations but it resulted in Ms Hornsey's appointment and, with

that, Mr Macdonald's departure. That, however, took a further week within which the final events giving rise to this claim occurred.

[17] On 30 October 2013 Mr Macdonald received a draft letter (along with attachments) from the solicitors conducting the investigation which, he says, gave him reason to believe concerns about Ms Campbell were widespread and serious. He says the content also gave him cause to be concerned about the welfare of certain staff.

[18] He had also recently received Ms Campbell's performance appraisal. This signalled the completion of a formal process conducted by an external evaluator and his report again contained comments that concerned Mr Macdonald and indicated staff remained divided over Ms Campbell's treatment of them.

[19] To that was added a further issue arising from a staff meeting held on 31 October at which two members of the management team were said to have made comments strongly supportive of Ms Campbell and construed as threatening those who may oppose her. Mr Macdonald discussed this with four of those present. They are said to have given feedback which further exacerbated his concerns about the staff's *emotional safety*.

[20] Having thought about the situation Mr Macdonald instructed the solicitors write to Ms Campbell's representatives which they did the following day, 1 November 2013. The letter, which is long and detailed, contains advice that:

... the LSM has formed a preliminary view that your client should be suspended, from next Monday morning, while the investigation continues.

[21] It also advises:

... the LSM believes (on a preliminary basis) that your client should not be at work until the investigation concludes. The LSM appreciates this is an extremely significant step and therefore wishes to give your client an opportunity to comment.

[22] The letter, which was sent at 4.09pm, advises Ms Campbell should leave work immediately. She was not to report to school on the following Monday but attend a meeting, by telephone, at 8.30am to discuss the proposed suspension.

[23] Ms McMillan responded by protesting the decision on the ground it was unreasonable given the time required to consider the 116 page attachment. There were also issues arising from the fact Ms Campbell was at an event in a remote location and would not be contactable over the weekend. It is alleged Mr Macdonald knew this yet continued regardless.

[24] Correspondence continued and included an email on Saturday 2 November from the Board's solicitors to Ms McMillan advising a draft statement Mr Macdonald intended distributing to the wider school community. It advised the appointment of a Commissioner was inevitable but, notwithstanding, the investigation into the working environment at Salford would continue and a final report was expected *in a few weeks*. It then advises:

The material given to me and my concerns about the welfare of staff in the current environment have persuaded me to suspend Marlene Campbell from her role as Principal, while the investigation continues.

[25] Correspondence continued, though without input from Ms Campbell. At 6.11am on Monday a modified statement was sent to staff. It advises:

I want to let you know that I have made a preliminary decision to suspend Marlene from her role as Principal, while the investigation continues. At the moment my decision is a preliminary one. I expect to be in a position to finalise the decision either later today or tomorrow, and will provide an update at that point. In the meantime Marlene will not be at work.

If the suspension continues then I also expect to make a brief statement to the school community and media either late today or tomorrow. If you are asked for comment before then, please simply advise that you are not able to discuss the matter, but you do expect the LSM to be making a statement either late today or tomorrow morning.

Thank you again for your hard work and support for the School.

[26] Discussions continued through the day and led to the School advising a deadline for feedback about suspension of 9.30am on Tuesday 5 November. That was again challenged as unreasonable but it appears there were problems sending the email and it was not delivered till half an hour after the deadline. In the interim Ms Campbell had issued a press release and Mr Macdonald publically confirmed the suspension around 11am on the 5th.

[27] On Wednesday 6 November 2013 Mr Macdonald became aware Ms Hornsey was to be appointed Commissioner. Her appointment took effect and she has since confirmed the suspension which Ms Campbell now wants lifted on an interim basis.

[28] Ms Hornsey confirmed the suspension having met and corresponded with Ms Campbell. She gives, as her reasons, a conclusion the school could function with Ms Campbell absent and a view the *potential effects on the emotional safety of current staff* outweighed her concerns about an ability to develop a professional working relationship with Ms Campbell. She puts her choice to a conclusion the investigation indicated potential serious misconduct and an impression, gathered from the correspondence, Ms Campbell refused to engage in meaningful discussion about the schools concerns.

[29] Ms Hornsey also advises she expects a further report from the investigators this week. She will then seek comment from Ms Campbell but expects the outcome to be a disciplinary process, the length of which is uncertain. She does however suggest her goal would be to complete the process by years end but, failing that, no later than the beginning of the new school year.

Determination

[30] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but through addressing two broad questions. Is there is an arguable case and where does the balance of convenience lie? The second question requires the Authority to stand back and ascertain where the overall justice lies (see *Klisser Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)).

[31] In the exercise of its discretion the Authority needs to consider:

- (a) Is there an arguable case Ms Campbell's suspension is unjustified;
- (b) If the outcome favours Ms Campbell, is there an adequate alternative remedy available to Ms Campbell;
- (c) Where does the balance of convenience lie; and
- (d) What outcome does the overall justice of the case require?

[32] With respect to the question of whether or not Ms Campbell has an arguable case the answer must be yes.

[33] An interim application is decided on untested affidavit evidence. Here the parties disagree about almost everything with considerable divergence about both Ms Campbell's alleged managerial deficiencies and the way in which they were addressed. Resolution of these differences requires the evidence be tested and that will only occur in a substantive hearing.

[34] If Ms Campbell's assertions have foundation she will not only have an arguable case but, in all probability, a successful one. Conversely, should the School's evidence be preferred, she will struggle.

[35] That said, it should be remembered this claim relates to the suspension and not the outcome of an investigation into the substantive concerns. That is yet to come.

[36] In respect to the suspension I note major disagreement over the timing of the suspension and the manner in which it was advised. Predetermination is also alleged with claims Mr Macdonald expressed the view he was ill disposed toward Ms Campbell and sought her removal more than once. Finally there is an allegation Mr Macdonald breached provisions contained in Ms Campbell's employment agreement about how a suspension should occur. There is a lot of conflicting evidence in respect to these issues which can only be resolved by testing the evidence. Again there could be very different outcomes depending on whose evidence is preferred and Ms Campbell's claim must therefore be considered arguable.

[37] Mr Sim also argues that even if reinstatement could be justified on an interim basis given the lower threshold of arguable case, I must consider whether the same would occur in a substantive setting. He argues the circumstances are such it couldn't. In this instance I consider the distinction irrelevant. First, it is extremely unlikely this claim will ever be the sole subject of a substantive investigation as it will undoubtedly be overtaken by the outcome of the investigation into Ms Campbell's alleged conduct (whatever that may be). Second, and if the deficiencies were found to be as extensive as alleged, reinstatement could be a distinct possibility.

[38] There is then the question of alternate remedies which normally considers the availability and adequacy of damages. Ms Campbell is suspended and remains on pay. Therefore, and if she were ultimately successful in a substantive setting, there

are really only two remedies available – reinstatement and a compensatory sum under s.123(1)(c)(i) of the Act. In other words, and given damages are available, there is a suitable alternate.

[39] There is however another factor. Ms Campbell's evidence and the submission in support of her application suggest the issue of addressing reputational damage is a significant factor in bringing this claim and the reputational damage cannot be fully and adequately addressed through an award of damages. However, and as Mr Sim pointed out, it cannot be addressed through an interim reinstatement application either. As was said by the Court in *Gazeley v Oceania Group (NZ) Ltd* [2012] NZEmpC 8 at paragraph 32, interim reinstatement will not remedy reputational damage given it involves no conclusion about whether the employer's action was justified.

[40] For the above reasons I conclude there is an adequate alternate remedy.

[41] Turning to balance of convenience. A number of issues were discussed in what were comprehensive submissions from both parties. It is, in my view, finely balanced.

[42] For Ms Campbell is the fact Mr Macdonald suspended her as he was concerned about staff safety but there is no evidence he put those concerns to, or considered the response of, the bulk of staff when reaching his conclusion. Indeed the document that provided the stimuli for the decision to suspend concentrates on concerns about the well-being of one individual.

[43] Similarly Ms Hornsey's evidence is she concluded similar concerns remained when deciding to confirm the suspension. That said she also uses the word *potential* and again there is no evidence she consulted allegedly affected staff and confirmed whether or not that which had potential might actually come to fruition.

[44] Potential and actual are somewhat different. Not only is there no evidence the potential might be realised the history of this matter would suggest otherwise. These concerns, or at least ones similar, were being aired over a considerable period of time (see, for example the Board minutes of 20 September 2012) yet the evidence is Ms Campbell made an effort to avoid giving an opportunity they be repeated (refer various comments in Ms Campbell's performance appraisal).

[45] The long period over which the parties have been engaging over concerns about Ms Campbell's management style raises two further points. Favouring reinstatement is the fact that while there have been ongoing tension with multiple investigations these did not give rise to a suspension. Indeed the evidence is notwithstanding the School's refusal to provide details of complainants Ms Campbell had a fair idea who they were yet, as already said, she avoided what might be perceived as an inappropriate reaction. Indeed there is evidence from feedback reported in the performance appraisal that staff consider she has, in recent times, ameliorated her behaviour.

[46] This however is balanced by the previous reports which were completed by investigators experienced in school matters. They indicate a high level of division with both supporters and detractors of Ms Campbell firmly entrenched in their respective camps. There is also the more concerning observation of Mr Hay that he would conclude Ms Campbell was most likely guilty of serious misconduct but it could not be investigated as potential complainants were too fearful to come forward.

[47] That impediment appears to have been overcome to some extent with people now more willing to talk though it should be noted they started doing so before Ms Campbell's removal.

[48] Having considered these issues I turn to two factors that I consider tip the balance in the School's favour.

[49] Ms Campbell seeks to return to the school, properly farewell the children who have been in her care for the majority of the year at their final assembly tomorrow and then work toward reintegrating herself within the school community.

[50] However neither goal is attainable in the near future. The School says there is no prospect of Ms Campbell successfully returning without careful planning, reintegration and support. Comments made by Ms McMillan when giving her submissions suggest Ms Campbell concurs with this view but is more than willing to work with the School to ensure appropriate measures are taken.

[51] That is well and good but the comments from both parties indicate external resources would most likely play a part in the process. From what was said I have to conclude it would be highly unlikely an appropriate programme could be put in place by either tomorrow or Friday, which is the last day of school. In other words

Ms Campbell can no longer attain that which she seeks, namely an immediate return. To that I add the fact the school is then in recess and by the time of a return in the new year the substantive investigation into the School's concerns may well be complete.

[52] Both parties agree the process must be completed with both expressing the view the sooner the better. I agree, and in doing so suggest it should have been done some time ago.

[53] Given Ms Campbell can no longer return by the end of the year I consider the parties are best served by putting effort into completing the substantive investigation. It is best to put time and resource into resolving the substantive concerns one way or the other rather than diverting them to a reintegration that may only be temporary. If reintegration is going to occur, put the effort in in the knowledge return is permanent and as a result of Ms Campbell successfully answering the School's concerns.

[54] In other words the process is now so far advanced the balance of convenience favours its completion especially as reinstatement is not going to occur in the timeframe sought by Ms Campbell.

[55] While I have concluded Ms Campbell has an arguable case, I have also found there is a viable alternate remedy and the balance of convenience favours the School. It therefore follows the overall justice also favours the School.

Conclusion and Costs

[56] For the above reasons I have concluded the overall justice favours the School. Ms Campbell's request the suspension be lifted is therefore declined.

[57] In reaching this conclusion, and given the tipping point in respect to convenience, the parties should note a key consideration has been Ms Hornsey's undertaking she can complete the investigatory process before the new school year. Should she fail she should be warned I would be more than amenable, given what I heard, in revisiting this conclusion and reaching another.

[58] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority