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Carroll v Vince Roberts Appliance Warehouse Ltd (Auckland) [2012] NZERA 750; [2012] NZERA Auckland 395 (13 November 2012)

New Zealand Employment Relations Authority

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Carroll v Vince Roberts Appliance Warehouse Ltd (Auckland) [2012] NZERA 750 (13 November 2012); [2012] NZERA Auckland 395

Last Updated: 19 December 2012

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2012] NZERA Christchurch 255
5401330

BETWEEN PRUDENCE ELIZABETH TAYLOR

Applicant

A N D CHRISTCHURCH GIRLS' HIGH SCHOOL BOARD OF TRUSTEES Respondent

Member of Authority: David Appleton

Representatives: Richard Harrison, Counsel for Applicant

Peter Macdonald, Advocate for Respondent Investigation meeting: 21 November 2012 at Christchurch Submissions Received: 21 November 2012

Date of Determination: 23 November 2012

DETERMINATION OF THE AUTHORITY

A. The application by Prudence Taylor for interim reinstatement pending the hearing of her personal grievance is granted on the conditions set out in this determination.

B. Costs are reserved.

Employment relationship problem

[1] Mrs Taylor seeks interim reinstatement to her position as Principal of

Christchurch Girls' High School (the School) following her dismissal on 2 November

2012 by the Board of Trustees (the Board).

[2] The respondent opposes that application and asserts that the dismissal was justified on the basis that the employment relationship had irretrievably broken down.

[3] As is usual in applications for interim relief of this kind, no oral evidence was heard by the Authority but sworn affidavits were lodged by Mrs Taylor (an originating affidavit and one in response to the respondent's affidavits), Mr Allen (an educational consultant supporting Mrs Taylor, who had prepared her last appraisal report) and by Mr Margaritis (chairman of the Board), Ms Guillemot-Rodgers (manager of the School's boarding hostel) and Mr Blyth (staff trustee on the Board).

[4] Mrs Taylor has provided the undertaking required by s.127(2) of the

[Employment Relations Act 2000](#) (the Act).

The key events leading to the dismissal

[5] Mrs Taylor has been the Principal of the School since 1999 and is employed

pursuant to the Secondary Principals' Collective Agreement, effective between

11 February 2011 to 29 March 2013 (the collective agreement).

[6] In November 2011, Mrs Taylor was subject to her annual performance appraisal, which was carried out by Mr Allen, an external appraiser from UC Education Plus. The appraisal took place by way of Mr Allen surveying a group of teaching and non-teaching staff and interviewing a smaller, randomly selected group, as well as Mrs Taylor and the Board of Trustees. Mrs Taylor was appraised against the Secondary Principals' Professional Standards. Mr Allen's analysis of the survey was that its respondents:

... appeared to be divided into two groups on many of the standards between those who rated [Mrs Taylor's] performance from satisfactory to outstandingly effective and those who rated her performance less than satisfactory.

[7] The appraisal identified Mrs Taylor's strengths (including her leadership of the School over the appraisal year, during which a major earthquake had occurred), her resilience and courage, her efforts made to ensure that staff who were badly affected by the Christchurch earthquakes were OK, her abilities as a public speaker, her being a role model of personal

excellence and a strong advocate for women and girls' education.

[8] The appraisal also identified areas for development which included a lack of tolerance of those who did not come up to her expectations (also seen as a strength by some respondents according to the appraisal), a feeling that Mrs Taylor could be unduly harsh and unfair in her criticism, a feeling that Mrs Taylor micro-managed, a process of decision-making which lacked transparency, clarity and consistency, her management of change and her effectiveness as an educational leader within the School.

[9] Mr Allen's conclusion was that Mrs Taylor met all the professional standards for secondary school principals to a level which was rated satisfactory or above, that a majority of those contributing to the online survey were strongly supportive of her as principal but that more than 20% of the respondents and those interviewed identified a number of frustrations and concerns at Mrs Taylor's leadership. Mr Allen stated in his appraisal report that the development of a performance agreement needed to be undertaken which would provide Mrs Taylor with an opportunity to reflect on her principalship and the feedback she had received through the appraisal. This would provide the Board with the opportunity to make clear the objectives it wished to achieve and to discuss with Mrs Taylor how those could be reflected in her performance agreement.

[10] The appraisal document was tabled with the Board in February 2012. Mrs Taylor's affidavit evidence was that the performance agreement was not put in place, although a partially completed document was produced to the Authority which stated that its aims were to enable, encourage and support Mrs Taylor in carrying out her responsibilities and to allow her performance to be monitored and assessed and to enable her and the Board to identify general and critical strategies to advance the goals of the school in the strategic plan, policies and other decisions of the Board.

[11] In particular, her goals were summarised as follows:

1. *To clarify and strengthen relationships between Principal and the Board;*
2. *To articulate and implement a school vision which will better equip girls for life beyond school; and*
3. *To undertake a professional inquiry into the future of education for girls.*

[12] The strategy that was identified in the document to clarify and strengthen Mrs Taylor's relationship with the Board was to engage an outside facilitator to identify key impediments, to work with the facilitator on solutions to the impediments and to develop a plan to implement solutions working with the Board representatives.

[13] On 19 April 2012 Mr Margaritis, on behalf of the Board, wrote to Mrs Taylor stating that, over the previous 12 months, there had been various issues that had resulted in informal discussions with her relating to concerns that the Board had had with regard to aspects of the school's operational management. The letter identified the Board's concerns as including:

... difficulties in gaining your co-operation re the implementation/ introduction of certain Board initiatives; negative or difficult relationships with the Board and other parties; concerns with regard to the carrying out of essential risk management procedures; clear behaviour on occasions, where there has been a deliberate intention to ignore, or at least not fully comply with, required Board processes and other issues relating to the provision of accurate information and incomplete provision of information as it relates to the structuring of financial accounts and budget variations.

[14] Mr Margaritis invited Mrs Taylor to a meeting to discuss the Board's concerns which, he stated, would not be disciplinary in nature. Mrs Taylor responded to this letter asking for further details and Mr Margaritis responded by sending to Mrs Taylor a document headed *Examples of concerns that require discussion with the Principal*. Mrs Taylor responded to this document with a detailed document in return setting out her position on each of the examples of concerns that had been provided.

[15] A meeting took place between Mrs Taylor, three members of the Board (but not Mr Margaritis) and Mr Macdonald, the Board's employment law adviser, on

21 May 2012.

[16] An email dated 25 May was sent to members of the Board and to Mrs Taylor by Mr Macdonald which included the following points:

a) The parties appreciate that the issues between them are serious and that there has been a serious "trust and confidence" breakdown and/or "disengagement" that has occurred between them.

b) In order for there to be a reasonable chance for the relationship to be "reconciled" successfully, both parties will need to commit to an agreed approach and timeline.

c) The commitment on "both sides" will be genuine and conducted in a "good spirit" with the intention of resolving all outstanding issues and returning the Board/Principal relationship back on to a sound and workable basis.

d) Both parties nevertheless reserve all their rights and options re alternative processes should, at any point, the "reconciliation" attempts become unachievable.

(3) The discussions on Monday 21 May 2012 were not part of any formal appraisal process but, rather, the meeting was called by the BOT [Board of Trustees] in order to address, informally, serious concerns that the BOT unanimously had with regard to what it saw as a fundamental breakdown in relationship with its Principal. Those BOT members who attended that meeting were present in the capacity as the approved representatives of the BOT.

[17] The email goes on to record that the reconciliation process would be assisted by a mediation carried out under the auspices of the then Department of Labour's Mediation Services.

[18] Mrs Taylor responded to Mr Macdonald's email in which she stated that she did not accept that there had been a *serious trust and confidence breakdown and/or disengagement*. She stated that there were *working relationship issues* which the parties had talked constructively about during their meeting. She also disagreed that the parties should reserve all their rights and options as she did not believe that the parties should be able to *store up issues for a rainy day*, and she did not believe that it was fair that she should have to operate under a *sword of Damocles* should the mediation process not resolve working relationship issues. Mrs Taylor received no substantive reply to her letter.

[19] The mediation took place on 12 July 2012 but, according to the affidavit of Mrs Taylor, no protocols, processes or any other similar outcomes came from the mediation.

[20] On 8 August 2012 Mr Margaritis wrote to Mrs Taylor stating that he had been advised that it appeared that Mrs Taylor had tried to have processed a payment for personal legal services that had been incurred by her in relation to legal advice she had obtained in relation to her position in the school. Mr Margaritis asked her to provide him with any information that would assist him in clarifying whether or not the transaction referred to had taken place and the details associated with it .

[21] Mrs Taylor responded to that letter on 17 August explaining that she had initially assumed that the invoice for legal services would be paid from her Principal's account since it was school related business. She explained that she had made inquiries and that there appeared to be uncertainty around the issue. Due to that uncertainty she reimbursed the school account for the amount that had been paid.

[22] An investigation was subsequently commissioned by the Board from an independent HR adviser (Mr Jamieson) who concluded that there was no evidence that Mrs Taylor had intended to deceive or to hide what she had done, but that the legal fees should not have been paid out of the principal's account. It identified that *Mrs Taylor had definitely made a significant mistake* but that it was *most likely made out of ignorance, rather than a malicious intent to deceive*.

[23] Mrs Taylor deposes in her affidavit that Mr Jamieson also acted as a go between with the Board, which conveyed through Mr Jamieson an offer to her relating to her future employment, which she declined to accept.

[24] On 24 August 2012, the Education Review Office (ERO) published its education review into the School. It contained a statement that:

The school is currently not well placed to sustain and improve all aspects of its performance. Professional relationships between the board, principal and senior managers are of concern. This situation has the potential to hinder the school's progress towards achieving its vision and direction. The board, principal and senior managers have identified and ERO has confirmed that these concerns need to be resolved urgently. The board has sought the services of an external consultant to resolve these concerns, but at the time of this review there has been no satisfactory resolution.

[25] In September 2012, the Ministry of Education provided to the Board broad details of the source of various comments of concern that related to *problems between the principal and the Board*. Comments identified as coming from senior managers essentially identified a dysfunctional relationship between the principal and the Board, with the senior managers *stuck in the middle*. Comments attributed as coming from Mrs Taylor included that the Board did not understand governance and that there was a blame culture and an atmosphere of no trust.

[26] A subsequent Official Information Act request by Mrs Taylor resulted in the ERO disclosing 47 specific comments which were said have been made *by one or more ...people*. These people included the deputy principal, the two assistant

principals, the hostel manager, the careers coordinator, Heads of Learning Areas, the teacher in charge of careers and the teacher in charge of learning support. Around

18 of these comments are direct criticisms of the principal although many others could be veiled criticisms of her, although without the context it is difficult to know. Many comments refer to relationship problems, without attributing blame. The vast majority of the criticisms are generalised.

[27] The Board was required to prepare and implement an action plan to address the concerns of the ERO, pursuant to s. 78L of the [Education Act 1989](#) but did not implement it after it was approved by the Secretary of the Ministry of Education.

[28] On 11 October 2012 a statement was provided to the Board of Trustees signed by the Deputy Principals and the two Assistant Principals. It is not clear what the catalyst for this statement being sent was. It was headed *Statement regarding the professional capacity of the Principal Prue Taylor* and contained the following text:

Leadership: *The principal has not implemented a school-wide vision of effective teaching and learning to improve student achievement. The principal is reluctant to engage with the Board of Trustees and Senior Managers in strategic planning. Principal-driven initiatives have not been sustained. The principal's decision making is inconsistent.*

Relationships: *The principal does not always sustain trust and respect within the Senior Management Team. The principal does not always manage conflict effectively.*

The undersigned understand that this statement may be provided, in confidence, to the principal and to her authorised advisor.

[29] By way of a letter dated 18 October 2012, the hostel manager for the School wrote a letter to the Board of Trustees stating that she no longer had trust and confidence in Mrs Taylor in her role with Acland House (the hostel). She stated that her decision had been based on a number of situations she had been faced with including, but not limited to:

- *A number of occasions where people have been misled and information withheld from the Board of Trustees, and parents by the Principal.*
- *On several occasions I have been questioned by the Principal, about matters that are not relevant to her, neither in her role nor in our professional relationship. This questioning had made me feel unsafe professionally and personally.*
- *I felt interrogated by the Principal on conversations I have had with third parties, including the Board of Trustees and Educational Review Office (ERO), which I understand are confidential.*

[30] The letter continued that these situations had made Ms Guillemot-Rodgers uncomfortable and compromised personally and professionally. She said that it had impacted on her health and made it increasingly difficult for her to perform her duties. Again, it is not clear what the catalyst for the sending of this letter was.

[31] Mrs Taylor deposes that she was not shown a copy of these two documents (dated 11 and 18 October) until they were included in a letter to her dated 23 October inviting her to a disciplinary meeting.

[32] On 22 October 2012, the full Board (excluding the student trustee) signed a statement addressed to Mrs Taylor referring to *the recent investigation conducted by Michael Jamieson, questions relating to a lack of trust and confidence by the Senior Management Team in their Principal... the most recent ERO report...and the management of Acland House holding similar concerns relating to trust and confidence in the Principal.* The letter continued:

The purpose of this letter is to inform you that the Board has, unanimously, now reached the point at which it has lost trust and confidence in your leadership of the school. It is our view that we have been proactive in taking all reasonable steps to resolve outstanding issues but that it would now appear that the divisions are so entrenched that our relationship may well have become irretrievably broken down.

The Board sincerely regrets having to write to you in this context but, nevertheless, the Board considers that it is now necessary to adopt a formal process in order to resolve outstanding matters. In this regard we will contact you again shortly.

[33] On 23 October 2012, Mr Margaritis wrote to Mrs Taylor referring to *what has appeared to be an ongoing breakdown in your relationship with the Board and the School's Senior Management.* The letter detailed the Board's attempts to "reconcile" and "restore" the relationship to a sound and workable one. The letter stated that:

... the reality now is that, despite such ongoing attempts, your relationship with the Board and Management appears to have reached a point at which the Board believes that its overriding responsibility and obligation must be to resolve all outstanding

matters with some urgency. It is in this context that the Board now wishes to meet with you in a disciplinary context.

[34] A number of attachments were included with the letter, comprising the ERO's report and notes; the statements from the Board, senior management team and hostel manager referred to above and Mr Jamieson's report into the expenditure issue.

[35] The letter went on to state:

The Board has given very careful thought to the content of the various attachments. It does appear that the point has now been reached whereby it seems clear that there has been a fundamental breakdown in trust and confidence in your leadership and that it may well be quite unrealistic to expect that the relationship is able to be repaired.

[36] The letter went on to state that the allegation was serious and, if established, would constitute misconduct and that, within the terms of clause 6.3 of the Secondary Principals' Collective Agreement, disciplinary action up to and including dismissal *would follow*. Mrs Taylor was invited to attend a meeting on 31 October or

1 November and she was invited and encouraged to bring a representative of her choice.

[37] Mrs Taylor responded to Mr Margaritis' letter by way of a letter dated

26 October 2012. Mrs Taylor raised a number of points in her letter, including that she did not agree that there had been genuine attempts at reconciliation, that she had been the subject of *unpleasant and rude correspondence/behaviours from Mr Macdonald and yourself*, and that none of the three senior managers had approached her at any time directly or through a third party to raise any issue or concern about her leadership or their working relationship.

[38] Mrs Taylor went on to request information in relation to the allegations that she was to answer in the disciplinary meeting that had been arranged. The information that Mrs Taylor requested was as follows:

1. The allegations which the three senior staff are making against me as the statement of 11 October 2012 [sic] are very general in nature. Specifically:

- The implementation of a school-wide vision of effective teaching and learning to improve student achievement requires further elaboration in terms of what specific policy or directive it is said that I have not implemented, and when was this to be implemented?*
- Instances in which I have failed to engage in strategic planning with either the Board of Trustees and/or senior managers.*
- Instances where it is said that I have not sustained "principal-driven initiatives" (and for these to be identified) as well as identifying decision-making that it is inconsistent.*
- Similarly, with the very general claims around relationships, and instances in which the most senior managers say I am at fault for not sustaining "trust and respect" within the team, or where I have not managed conflict effectively.*

2. The allegation in respect of a payment for Richard Harrison's legal cost which was the subject of the investigation which you implemented and sent me a report on. What is the allegation that arises out of that report and to which I now have to respond

following co-operation with this investigation?

3. If there are any other “allegations” which you expect me to respond to or may arise at some point, these need to be disclosed and particularised now.

4. All information held by yourself and any other Board member in relation to the matters set out in your letter of 23 October 2012 including file notes, emails between officials within the Ministry of Education, ERO as well as staff members including members of the senior management team.

5. All documentation held by Mr Macdonald in respect of his meetings (which I know have taken place within the school) including interview notes, file notes, and email with any school staff or Board members.

6. All communications between Mr Macdonald or individual Board members as between officials of the Ministry of Education and ERO.

7. Any documentation that has been provided to either yourself or Mr Macdonald leading up to the letter of 23 October 2012.

8. The file notes/interview notes taken by Michael Jamieson during his investigation as well as correspondence between himself, Mr Macdonald and any Board member including email communications. If you don't hold the information being sought in this regard, then please advise and I will contact Mr Jamieson directly and request compliance.

[39] Mrs Taylor concluded by stating that she felt that the proposed date of

31 October or 1 November 2012 was too early.

[40] Mr Margaritis responded to Mrs Taylor by way of a letter dated 29 October

2012 which included the following passages:

Having taken account of all relevant circumstances the Board's position is as follows:

a) You have been provided with all material information that is directly relevant to the discussion that the Board requires to have with you.

b) The various attachments to our letter of 23 October 2012 leave no doubt whatsoever that the apparent/alleged breakdown in trust and confidence in your leadership is deep seated and wide spread. As Governors of the school, the Board has certain statutory obligations, the most fundamental of which means that the current climate of alleged mistrust in our school cannot be allowed to continue.

c) Contrary to your suggestion in your letter, the allegations have been quite clearly and specifically stated in our letter of

[41] The letter concluded as follows:

As your employer the Board requires you to attend this meeting and, should you wish, to provide a response to the allegations/concerns that have been communicated to you. Please confirm your attendance. Should you not attend the meeting, the disciplinary meeting will proceed in your absence and the Board will, having assessed all relevant information that is available to the Board at that time, make its decision as to what, if any, disciplinary action will result. The Board wishes to leave you in no doubt as how seriously it views the situation and, in particular, the immediate risks that the Board considers that the apparent management dysfunction poses for the school. Accordingly, the Board is not in a position to accept further delays in the date of this meeting. The meeting will take place on the stated date and time.

[42] Mr Harrison, Mrs Taylor's legal representative, wrote to Mr Margaritis on

31 October 2012 stating that the information that had been sought was required prior to his client's attendance at the meeting and that Mrs Taylor was very willing to cooperate and to meet but she was entitled to know the substance of the allegations which she faced and to receive the information she had requested in advance of the meeting.

[43] Mr Macdonald on behalf of the Board of Trustees responded on 1 November to Mr Harrison stating that Mrs Taylor had been provided with full information in relation to the matters to be discussed at the meeting and that *there is no other*

information. The letter finished by reiterating the instruction to Mrs Taylor to attend the disciplinary meeting.

[44] A further letter followed from Mr Harrison's firm on the same date stating that Mr Harrison was not in a position to attend the meeting in Christchurch as Mrs Taylor's representative the following day (the new date of the disciplinary meeting – 2 November 2012). The letter stated that Mrs Taylor was very willing to cooperate and attend the meeting but that she was entitled to have a representative attend at the meeting and to have the documents and information she had requested.

[45] Mr Macdonald responded the same day by email declining to adjourn the meeting on the basis that Mr Harrison had had ample opportunity to request an adjournment, stating that the full Board intended to attend the disciplinary meeting and that many of them had had to make alternative work and business arrangements in order to ensure their availability to answer any questions that Mrs Taylor may have. In addition, Mr Macdonald stated that the Board chair was out of town late the following week as were other Board members at various times during the week.

[46] Mr Harrison's firm responded later the same day stating that Mrs Taylor was not able to attend without representation given the tone and communications and the covert circumstances which had placed her under considerable stress. The email stated that, if the Board proceeded with the meeting and made any decision that was detrimental to Mrs Taylor's employment, such action would be a serious breach of the Board of Trustees' obligations.

[47] The Board of Trustees met on 2 November 2012, in the absence of Mrs Taylor and her representative, and decided to dismiss Mrs Taylor. No minutes of that Board meeting have been put before the Authority. The Board wrote to Mrs Taylor by way of a letter from Mr Margaritis dated 2 November 2012 advising that her employment was to be terminated effective from 3pm that day. It stated that, whilst the terms of her collective agreement did not require the Board to pay her notice in lieu, it had decided to pay her the equivalent of two months' salary on an ex gratia basis. The reasons for the dismissal were stated as follows:

a) For several years there have been ongoing and increasing tensions between the Board and the Principal.

b) In particular, from April 2012 the Board has been working proactively with you in its attempts to resolve the clear

divisions that have existed and become more apparent and serious. These attempts have proven unsuccessful.

c) In August 2012, ERO published its Report and that Report was damning [sic] with regard to the apparent breakdown in governance and management relationships. In this regard ERO stated:

“Professional relationships between the Board, Principal and Senior Managers are of concern. The situation has the potential to hinder the School’s progress towards achieving its vision and direction. The Board, Principal and Senior Managers have identified and ERO has confirmed that these concerns need to be resolved urgently.”

d) Subsequently, the Board received and has supplied to you statements from the entire Senior Management Team and the Management of Acland House that make it quite clear that there has been a fundamental loss of trust and confidence in your leadership.

e) The Board, by signed letter, has unanimously resolved that they no longer have trust and confidence in your leadership.

f) Notes from ERO that support the ERO Report findings plus the release of further information from ERO as a result of an OIA request add further, significant comments that point to a management failure and a fundamental breakdown in relationships.

As has been previously stated to you the primary “concern” that has been brought to your attention is that, as Principal, you have failed in an essential duty which is to ensure that you develop and maintain positive relationships with your management team. There can be no question that this requirement is fundamental to the proper operation of the School and its structures. Therefore, and taking account of all relevant information available to the Board, the Board has concluded that the relationship of trust and confidence that must exist in such an employment relationship has completely broken down. Accordingly, the Board with great regret has no option other than to inform you that your employment has been terminated.

Issues

[48] In determining whether interim reinstatement should be granted to Mrs Taylor and, if so, under what conditions, if any, the Authority must take into account the requirements of the [Employment Relations Act 2000](#) (the Act) and the following principles:

(a) Whether the applicant has both an arguable case of personal grievance for unjustified dismissal and, if so, an arguable case that she would

thereafter be permanently reinstated in employment rather than simply compensated financially;

(b) Where the balance of convenience lies between the parties, including an assessment of whether other remedies would be adequate; and

(c) Where the overall justice of the case lies until it can be heard. [49] [Section 127](#) of the Act provides as follows:

(1) The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.

(2) The employee must, at the time of filing the application for an order under subsection (1), file a signed undertaking that the employee will abide by any order that the Authority may make in respect to damages-

(a) that are sustained by the other party through the granting of the order for interim reinstatement; and

(b) that the Authority decides that the employee ought to pay.

(3) The undertaking must be referred to in the order for interim reinstatement and is part of it.

(4) When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.

(5) The order for interim reinstatement may be subject to any conditions that the Authority thinks fit.

(6) The Authority may at any time rescind or vary an order made under this section.

[50] The object of the Act, referred to in [s.127](#), is set out in [s.3](#) of the Act and includes the following objectives:

(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –

(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and

(ii) by acknowledging and addressing the inherent inequality of power in the employment relationships;

[51] [Section 125](#) of the Act, dealing with the remedy of reinstatement, states as follows:

(1) This section applies if –

(a) it is determined that the employee has a personal grievance; and

(b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in [section .123\(1\)\(a\)](#)).

(2) The Authority may, whether or not it provides for any of the other remedies specified in [section 123](#), provide for

reinstatement if it is practicable and reasonable to do so.

[52] [Section 123\(1\)\(a\)](#) of the Act refers to *reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee.*

[53] Since April 2011, reinstatement is no longer a primary remedy.

Is there an arguable case for unjustified dismissal?

[54] In determining this question, the Authority must be mindful of the test that is set out in [s.103A\(2\)](#) of the Act, which states as follows:

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[55] [Section 103A\(3\)-\(5\)](#) of the Act states as follows:

(3) In applying the test in subsection (2), the Authority or the court must consider –

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it considers appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

(a) minor; and

(b) did not result in the employee being treated unfairly.

[56] Relevant to the question of whether there is an arguable case for unjustified dismissal is the duty of good faith contained in [s.4](#) of the Act. Of particular relevance in this case is [s.4\(1A\)\(a\)-\(c\)](#). These subsections provide as follows:

(1A) The duty of good faith in subsection (1) –

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[57] An arguable case means a case where there are some serious or arguable, but not necessarily certain prospects of success *X v. Y Ltd and The New Zealand Stock Exchange* [\[1991\] NZEmpC 48](#); [\[1992\] 1 ERNZ 863](#).

[58] It is my view that there is a strongly arguable case for unjustifiable dismissal. This conclusion is based on the following factors.

The respondent's refusal to provide specific information prior to the disciplinary

meeting

[59] The letter of 23 October 2012 commenced by referring to the Board's *increasing concerns with regard to what has appeared to be an ongoing breakdown in [Mrs Taylor's] relationship with the Board and the School's Senior Management*. It goes on to enumerate attempts to "reconcile" and "restore" the relationship to a sound and workable one. (Mrs Taylor does not accept that the examples given were as characterised by the respondent). The letter then states the following:

The allegation is that, as Principal, you have an essential duty to ensure that you develop and maintain a positive relationship with your management team. The Board views this obligation as a key competency. The effectiveness of the school's management structures is fundamental to both the internal and external profile and success of the School. In this regard, and as you know, ERO have highlighted serious concerns and, based on the evidence that is attached to this letter, it would appear that those concerns are well founded.

An additional allegation relates to the concern expressed as part of the outcomes of the recent investigation in relation to what appeared to be the payment of a personal account out of School funds.

No other detail of the allegations were referred to in the body of the letter.

[60] The letter attached six accompanying documents detailed in paragraph [34] above. However, a close examination of these documents does not give any substantive detail (essentially, the when, where and how) of any incidents which led the Board to conclude that there were serious concerns to be investigated. For example, perhaps the most serious allegation relates to the alleged breakdown in the relationship between Mrs Taylor and her senior management team, consisting of the deputy and the two assistant principals. This allegation was based, in part at least, on the signed statement from the three dated 11 October 2012. This statement included the paragraph *The principal does not always sustain trust and respect within the Senior Management Team. The principal does not always manage conflict effectively*. Mrs Taylor was clearly entitled to know specifically when and how she had failed to do so with respect of the three senior managers. It was quite impossible for her to address these concerns without knowing which incidents were in the minds of the three senior managers when they signed the statement.

[61] Similarly, the letter dated 18 October 2012 from Ms Guillemot-Rodgerson was included in the letter of 23 October. This letter of 18 October contained a statement that Ms Guillemot-Rodgerson had been questioned by the principal on several occasions which had made Ms Guillemot-Rodgerson *feel unsafe professionally and personally*. Again, as this was a very serious allegation, Mrs Taylor was entitled to know precisely which occasions Ms Guillemot-Rodgerson was referring to, in order to be able to be in a position to explain herself.

[62] These are just two examples of allegations (or *concerns* as the respondent prefers to label them, although the word *allegation* was used in the letter of 23 October) about which Mrs Taylor was entitled to further specific information. The failure (and outright refusal) of the respondent to provide the information appears strongly to amount to a breach of the duty of good faith set out in s. 4(1A) of the Act. This, alone, is capable of rendering the decision to dismiss unjustifiable.

Failing to accommodate Mrs Taylor's request to be present at the meeting with a representative of her choice

[63] Mr Macdonald wrote to Mrs Taylor's representative refusing, on behalf of the Board, to move the date of the disciplinary meeting when he was advised that Mrs Taylor's representative could not attend because he was due in court the same day. Mrs Taylor's representative is based in Auckland.

[64] Whilst it does appear that Mrs Taylor's representative left it very late to tell the respondent of his difficulty, and could possibly have done so earlier (although this is not entirely clear), given the very serious nature of the disciplinary meeting that was to take place, in my view no reasonable employer could have failed to accommodate the request to postpone the meeting until the following week to ensure that Mrs Taylor was able to attend with her chosen representative.

[65] I do not accept that the meeting was *rescheduled on several occasions* as has been stated in the statement in reply. It would appear that it was rescheduled twice, from a choice of 31 October or 1 November, to 2 November. Furthermore, there appears to be no cogent evidence presented to the Authority to justify the *urgency* that the respondent insists had to be accorded to the matter. Whilst the ERO report stated that the professional relationships between the board, principal and senior managers were of concern and that the concerns had to be resolved urgently, there was

seemingly no event which reasonably justified according the matter such urgency that the Board could not wait a few extra days before meeting with Mrs Taylor.

[66] In any event, clause 6.4 of the collective agreement allows for a principal to be suspended or transferred temporarily to other duties while allegations are investigated *if the alleged conduct is deemed sufficiently serious*. This option does not appear

to have been explored at all by the respondent.

[67] The deliberate decision to proceed with Mrs Taylor's dismissal without having allowed her to attend with her chosen representative was not the action that any reasonable employer could have taken, and so is another indication that there is a strong argument that the dismissal was unjustified.

The decision may have been predetermined

[68] The fact that the Board wrote to Mrs Taylor on 22 October stating that ...*the Board has, unanimously, now reached the point at which it has lost trust and confidence in your leadership of the school*, before it invited her to the disciplinary meeting, is strongly suggestive of predetermination on its part.

[69] This provides further evidence to suggest that there is a strongly arguable case that the dismissal was unjustified.

No evidence that Mrs Taylor had ever been told previously that she faced dismissal in relation to the concerns of the Board

[70] Nothing put before the Authority showed that Mrs Taylor had ever been formally warned prior to the 23 October 2012 letter from Mr Margaritis that she could be dismissed as a result of the Board's concerns, even though the Board has stated that their concerns had been increasing over a significant period of time.

[71] Given that there does not appear to have been a one-off, recent episode of misconduct that is relied upon by the respondent to dismiss Mrs Taylor, and that it appears to be relying on matters that it says have been brewing for some time (I refer to the reasons for dismissal stated in the letter of dismissal dated 2 November) there is room for argument that a failure to warn Mrs Taylor that she faced dismissal in relation to the matters of concern which the respondent says had been extant for some

time, amounts to a procedural failing which, again, presents an arguable case that the dismissal was unjustified.

The mixing up of capability and misconduct issues

[72] The respondent has characterised throughout its correspondence with Mrs Taylor its concerns as relating to *misconduct*. The respondent's statement in reply refers extensively to clause 6.3 of the collective agreement, which deals with misconduct. Certainly, allegations of conduct such as intimidation of staff, which have been referred to in the respondent's affidavits, are clearly better characterised as misconduct rather than competence.

[73] However, at least some of the concerns of the Board appear to be more accurately referred to as matters of competency, which is dealt with in clause 6.2 of the collective agreement. (For example, the concerns about Mrs Taylor's *leadership* as referred to in the senior managers' statement dated 11 October 2012, seem better characterised as competency than misconduct issues).

[74] Mixing up matters of competency with misconduct, so that the wrong procedure is used by the respondent, gives rise to an argument that there has been a procedural failing which could give rise to a finding of unjustified dismissal.

[75] Whilst steps have apparently been taken in the past to assist Mrs Taylor to achieve her objectives and address concerns identified in a previous appraisal, it is not clear to what extent any steps have been taken in compliance with clause 6.2 of the collective agreement (or its predecessor) to address more recent concerns insofar as they relate to perceived failures in competency. To the extent that the steps have not been taken, that would amount to a procedural failing which could result in a finding of unjustified dismissal.

Summary

[76] In light of the above, there appears to be very strong evidence before the Authority to suggest that the dismissal of Mrs Taylor was procedurally, and possibly substantively unjustified.

Is there an arguable case for reinstatement?

[77] Reinstatement is no longer a primary remedy but remains one measure which may be selected from the range of remedies provided at s.123 of the Act to settle a personal grievance, provided it is *practicable and reasonable to do so* (s.125).

[78] The Court of Appeal examined practicability of reinstatement in *Lewis v Howick College Board of Trustees* [\[2010\] NZCA 320](#). The Court of Appeal reiterated the Court of Appeal's judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [\[1994\] NZCA 509](#); [\[1994\] 2 ERNZ 414](#) which had, in turn, affirmed the test applied by the Employment Court in that case. The Employment Court in *NZEI* said:

Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future..... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[79] The Employment Court in *Angus v Ports of Auckland Ltd (No2)* [\[2011\] NZEmpC 160](#) held, when considering the new requirement of reasonableness, as follows:

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McLraith was correct when he submitted that 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.

[66] 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.

[67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what

has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.

[68] *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, others, for example affected health care patients in institutions.*

[80] The respondent very strongly opposes reinstatement on the basis that there has been a loss of trust and confidence between Mrs Taylor and the Board, between her and her senior management team and between her and the hostel manager. Mr Margaritis deposes in his affidavit that the Board is concerned that, if Mrs Taylor were reinstated, *not only would there be an immediate increase in tension...but it is likely that there would be an immediate loss of senior staff to ill-health, or stress....*

[81] For no reason that has been explained to the Authority, none of the three senior managers swore affidavits attesting to their opposition to Mrs Taylor's reinstatement. They did, however, all three sign an undated statement which was exhibited to Mr Margaritis' affidavit. This renders the content of their joint statement as hearsay and, although the Authority may take into account evidence that is not strictly legal (s. 160(2) of the Act) it must carry less weight than sworn affidavit evidence.

[82] This joint statement commenced by stating *we consider it imperative that there is no interim reinstatement of Mrs Prue Taylor*. The statement continues by outlining how the absence of Mrs Taylor has not adversely affected the school, either in respect of the students or the staff, save for one part-time teacher aide who resigned stating her loyalty to Mrs Taylor as one of a number of reasons for her resignation.

[83] The statement also states:

The impact on the Senior Management Team would be extremely adverse if Mrs Taylor was granted interim reinstatement.Should Mrs Taylor return in an interim capacity, there can be no guarantee of the provision of a safe work place for the SMT [Senior Management Team]. Until the process through the Employment Relations Authority Court occurs, the detail of the victimisation, humiliation and unpredictable relationships previously experienced by members of the team, which have ongoingly caused stress and anxiety, cannot be expressed.

:

Mrs Taylor is aware of the concerns as they have been raised in facilitated forums as well as individually and collectively within the Senior Management group. No sustained change has occurred; matters had recently worsened, prior to the dismissal. We regularly bear the brunt of Mrs Taylor's moods. It is disquieting that Mrs Taylor does not acknowledge the negative interactions between her and SMT members. The dismissal is unprecedented relative to previous interventions to improve relationships across the senior team; the Senior Management Team fears the worse in terms of their treatment should Mrs Taylor be temporarily re-instated.

:

The greater good of the whole school should be the key determinant in this decision. It is our view that the best interests of all members of the school community would not be well served by the interim re- instatement of Mrs Taylor.

[84] Ms Guillemot-Rodgers deposes that she had felt interrogated by Mrs Taylor, and that she would not sleep the night before a meeting, due to stress and worry in case she may have said the wrong thing to the wrong person. This created a very

tense and uncomfortable employment situation for her, she said. Ms Guillemot- Rodgerson concludes her affidavit with the words:

I firmly believe that reinstating Mrs Taylor on an interim basis will do a great deal of harm to the school and cause disruption to the girls and detrimental to the school. Reinstatement would result in my position being untenable.

[85] Mr Blyth deposes that an interim reinstatement would cause more disruption than Mrs Taylor's dismissal, and that it would *cause a huge amount of tension for senior managers who feel particularly vulnerable having stood up and voiced their valid and wide- reaching concerns*. He also states that *there can be no confidence that Mrs Taylor will adhere to any agreements, provide complete or reliable information, manage staff or resources competently, and not act against those staff who have provided information to the Board or to ERO.*

[86] Mrs Taylor deposes in her affidavit in response that, to say that the issues that the senior management team and Ms Guillemot-Rodgerson have with her have created an unsafe situation was an exaggeration and that, on a day to day level, they had been working well and going about their duties without issue. She also states:

I would be available to participate in a mediation or facilitation-type process with these individuals from the outset and give my assurance to each of them personally that I want to work with them constructively, that they are very capable and competent senior staff, and that it is in the interests of the school to retain them in their

positions. I am confident that with a facilitation-type process we will be able to find some resolution.

Practicability of reinstatement

[87] Examining the issue of practicability first, and bearing in mind the Court of Appeal's definition of practicability in *New Zealand Educational Institute* as *capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully*, it is necessary to examine critically the impediments that the respondent asserts render reinstatement impracticable.

[88] There is, in the statement of the three senior managers exhibited to Mr Margaritis' affidavit, no detail of the *victimisation, humiliation and unpredictable relationships* that they have apparently suffered at the hands of Mrs Taylor. There is no explanation why, as asserted in this statement, that detail could not be expressed until the substantive investigation. The investigation into the interim reinstatement application was just the occasion to detail these issues, by way of sworn affidavit.

[89] Simply asserting a loss of trust and confidence is insufficient. The respondent relying on loss of trust and confidence must identify conduct on the part of Mrs Taylor that is incompatible with her duties under the employment contract: [Orme v Eagle Technology Group Ltd EmpC Wellington WEC40/95](#), 15 June 1995.

[90] Having read carefully all of the material put before the Authority, I am unable to identify a single specific incident that is alleged to have taken place in respect of which any of the three senior managers could reasonably (or at all) assert that Mrs Taylor has behaved unprofessionally towards them. There is much general assertion, and speculation about what may occur if Mrs Taylor were to be reinstated, but without specific examples, I am simply unable to assess objectively the veracity or likelihood of the content of the senior managers' statement.

[91] This is not to say that I do not believe that they have had difficulties with Mrs Taylor in the past. However, what they are, and when they occurred, is impossible to assess on the evidence I have before me.

[92] Therefore, as far as the three senior managers are concerned, I must prefer the sworn evidence of Mrs Taylor who asserts that she would be able to work with them, with the initial assistance of a facilitator. In relation to their concerns that they will be

targeted by Mrs Taylor for having resisted her reinstatement, or written the statement dated 11 October, Mrs Taylor's conduct towards these three managers would no doubt be very carefully scrutinised and any victimisation or retributory conduct by Mrs Taylor would rightfully merit disciplinary investigation. Therefore, I do believe that it would be practicable for Mrs Taylor to work with the senior management team, if the reinstatement were to be engineered in the right way.

[93] I am more certain about Mrs Guillemot-Rodgerson's concerns, as she has sworn an affidavit and has cited examples of her concerns both in that affidavit and in her earlier letter dated 18 October 2012. Whilst some of these concerns still lack specificity, it is at least possible to identify the broad issues. Mrs Taylor's responses to Mrs Guillemot-Rodgerson's letter and affidavit show that Mrs Taylor was largely unaware of these concerns.

[94] I do not underestimate the fear that Mrs Guillemot-Rodgerson expresses of her position were Mrs Taylor to be reinstated. However, it appears that Mrs Taylor has never had the opportunity to listen to Mrs Guillemot-Rodgerson's concerns in person and to engage with her about them. That process should take place in the presence of an independent facilitator. I believe that, in a school as large and well resourced as Christchurch Girls High School, it would be possible to ensure that any meetings between Mrs Taylor and Mrs Guillemot-Rodgerson would subsequently take place with another staff member being present until Mrs Guillemot-Rodgerson was reasonably satisfied that she felt safe. It would be incumbent on Mrs Taylor to win back Mrs Guillemot-Rodgerson's trust.

[95] In light of this, I also believe that it is practicable for Mrs Taylor to work with

Mrs Guillemot-Rodgerson.

[96] Turning to the Board, it is very clear to me that the relationship between Mrs Taylor and Mr Margaritis has seriously broken down, and may well be irretrievable. I do not attempt to apportion blame for that breakdown. This does impose an impediment to Mrs Taylor's reinstatement as she has to report to the Board, and Mr Margaritis is the Board's Chair. However, there is little evidence of what the other members of the Board feel individually, save for the affidavit of Mr Blyth and the statement dated 22 October 2012 and signed by the entire Board.

[97] Section 4 of the Act imposes on an employer and employee a duty to deal with each other in good faith and, specifically, requires them to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. That requirement means that the parties need to act professionally with one another.

[98] I fully accept that, were Mrs Taylor to be reinstated, there would be strains and tensions initially. However, given the legal obligation imposed on the parties under s.4 of the Act, those strains and tensions do not preclude the relationship being repaired and made to function.

[99] There is another important element to the question of practicability which needs to be borne in mind. Arising out of the August 2012 ERO report, an action plan was prepared and approved by the Secretary of Education which was designed to address the issues identified in the ERO report. However, at the time of Mrs Taylor's dismissal, it had not been implemented as required by s. 78L of the [Education Act](#). Mr Macdonald explained to the Authority that the Ministry of Education has recently cancelled the action plan, presumably as Mrs Taylor is no longer employed at the school.

[100] The action plan set out eight tasks which needed to be achieved and an external facilitator had been identified to assist in the process. It would undoubtedly greatly assist in integrating Mrs Taylor back into the school, while at the same time addressing the concerns of the senior managers, the Board and Mrs Guillemot - Rodgerson for this action plan to be revived.

[101] The Authority cannot direct the Secretary of Education to revive the action plan in the event of Mrs Taylor's reinstatement. However, if the plan were not to be revived, the Board could still implement the plan, availing itself of the facilitator who has already been identified, to greatly assist resolve the issues that led to the Board terminating Mrs Taylor's employment.

[102] In summary, whilst recognising the effort that would need to be made by all relevant parties, I believe that it would be practicable to reinstate Mrs Taylor.

Reasonableness of reinstatement

[103] The Employment Court stated in *Angus* that *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, others.*

[104] In this case this requirement encompasses not only the effect of reinstatement on the members of the Board, the senior management team and Mrs Guillemot - Rodgerson, but also the other teaching and non teaching staff, the students, their families and the wider community.

[105] The Board is adamant that it would not be reasonable to reinstate Mrs Taylor, because of the effect on the school's operation and because the managers who *spoke out*, both the senior management team and those who voiced discontent to the ERO, would feel *insecure and vulnerable*. However, apart from Mrs Guillemot-Rodgerson, it appears that it is not possible to attribute any specific comment to any manager. The comments made to the ERO were identified as having been made *by one or more of these people*, being a list of at least 10 individuals (dependant upon how many Heads of Learning Area there are). The three members of the senior management team have not made any comments on an individualised basis. None have said that they would resign if Mrs Taylor were reinstated, and none have referred to any potential impact on their health were she to be reinstated.

[106] Mrs Guillemot-Rodgerson stated in her letter to the Board dated 18 October

2012 that interactions with Mrs Taylor impacted on her health, including lack of sleep and being constantly on edge. It is not reasonable for any employee to have to suffer such an effect. However, Mrs Taylor appears not to have been at all aware of the effect her interactions were having on Mrs Guillemot-Rodgerson and, as principal, one of her key duties was to ensure the safety and welfare of her staff. If Mrs Taylor were to be reinstated, it would be an urgent task for Mrs Taylor to take all reasonably practicable steps to rectify this issue with Mrs Guillemot-Rodgerson.

[107] As far as the other, non senior staff members are concerned, the evidence suggests that Mrs Taylor was not disliked or viewed with concern. The Authority was shown a copy of a communication from a teacher to the Board, sent shortly after Mrs Taylor's dismissal, which stated that he was writing *at the behest a group of*

64 members of staff to express our shock and dismay regarding the termination of the contract of our Principal Prue Taylor. The document mainly complained of the lack of communication about the issue and did not ask for Mrs Taylor to be reinstated. However, it was certainly not supportive of the dismissal.

[108] As far as the wider school population is concerned, the Authority is wary of extrapolating from the snippets of evidence of support for Mrs Taylor that has come to its attention. I have seen nothing, though, to suggest that the student population would have any concerns about Mrs Taylor's reinstatement.

[109] Additionally, Mrs Taylor's counsel made a point in his submissions which, whilst couched in somewhat colourful language, does merit consideration. He pointed out that the behaviour of the school's staff and trustees act as role models for the student body. For the students to know that a process of reconciliation through concerted effort has been put in place to attempt to resolve personal and professional difficulties should act as a better life lesson than seeing their principal summarily dismissed apparently without lawful process having been followed. This factor, whilst relevant, is not, however, determinative of the Authority's decision in the matter.

[110] One final factor to consider in respect of both the reasonableness and practicality of reinstating Mrs Taylor relates to the disruption that is likely to occur. If Mrs Taylor were not reinstated, the life of the school would go on, with a new principal being eventually appointed. Whilst that, in itself, would be disruptive, it would present a fresh start for the school and the senior staff and the rest of the school would be likely to settle down to a new routine reasonably quickly.

[111] On the other hand, reinstating Mrs Taylor, with all the concomitant safeguards that would need to be put in place, would act as an ongoing distraction to her, her senior staff, and possibly, but to a lesser extent, the other staff and the students. That disruption is likely to go on for some time, as protocols and actions are developed and agreed, relationships are worked through and reviews carried out. There would also almost certainly be close scrutiny from all sides as the ongoing relationships between Mrs Taylor and the Board, and her senior staff, are examined both from inside and outside the school, including by the media.

[112] This likely disruption is, in my view, a potentially major impediment to a conclusion that reinstatement is reasonable and practicable. However, crucially, if the Board had ensured that the performance agreement and the action plan had been implemented at the appropriate time, the same process I refer to would have had to have been followed in any event. The difference is that the process could have been carried out far more discreetly, without all the external attention that would now be directed to it. That attention derives from the fact that the Board chose to dismiss Mrs Taylor summarily. In my view, it would not be reasonable to decline Mrs Taylor's application for interim reinstatement because of difficulties that have arisen out of the way that the Board has chosen to act.

[113] As for the problems of practicability which arise from the disruption caused, I believe that some of those can be lessened, although not eliminated, by the conditions that may be imposed by the Authority, particularly in respect of timing.

[114] In summary, I believe that there is an arguable case that Mrs Taylor would be reinstated at the end of a substantive investigation, and that interim reinstatement would be both practicable and reasonable.

Where does the balance of convenience lie?

[115] This question requires balancing the prejudice to Mrs Taylor of not reinstating her against the prejudice to the respondent in doing so.

Factors favouring the respondent

[116] I have already examined in some detail above the problems that could arise from reinstating Mrs Taylor. These can be summarised under two main headings; concerns of the senior staff as to how Mrs Taylor would behave towards them, and the disruption to the operation of the school.

[117] Whilst I do not underestimate the concerns of the senior staff, including Mrs Guillemot-Rodgers, I am mindful that Mrs Taylor has never had the opportunity formally to address their concerns with a full knowledge of what they are. All of the individuals concerned are professionals, and would all be expected to conduct themselves professionally and within the requirements of the Act in making genuine efforts to address the concerns. They would also have the benefit of the performance agreement, the action plan and the external independent facilitator,

which I anticipate would be of great assistance if utilised fully in addressing the issues. Therefore, I believe that any potential prejudice to the senior staff can be practically mitigated to a material degree.

[118] As far as the Board is concerned, they and Mrs Taylor also have to act professionally towards each other in accordance with their respective duties, and in particular, the s.4 duty of good faith. It is uncertain whether the relationship between Mrs Taylor and Mr Margaritis can be repaired, but it is incumbent on both to try, and upon the other Board members to ensure that the relationship between the two does not result in unlawful behaviour or disruption to the operation of the school.

[119] Regarding the disruption to the operation of the school, this is a potentially significant factor. It would undoubtedly be easier to integrate a new principal than to reinstate Mrs Taylor and put in place the framework for reconciliation which will be required.

[120] Mr Macdonald refers me to the Employment Court case of *Wellington Free Ambulance Service Inc v Adams* [2010] NZEmpC 59, WRC 15/10. In this case, the Chief Judge overturned the Authority's interim reinstatement of an emergency medical dispatcher who had been dismissed summarily because of *stupid, arrogant and even manipulative* conduct towards a particular colleague and *a widespread degree of dissatisfaction with Ms Adams by her work colleagues*. Arguably, a breakdown of trust and confidence with the staff who report to a more senior manager, as is asserted has happened in Mrs Taylor's case, is even more serious. The Chief Judge overturned the reinstatement on the basis of practicability, believing that the balance of convenience favoured the employer, observing that, to succeed, Ms Adams's reinstatement would require a *carefully crafted remedy* entailing a *carefully planned and mutually agreed process of training and counselling of Ms Adams and perhaps, also, counselling of other employees*.

[121] In my view, however, this case can be distinguished on several levels. Ms Adams was at the start of her career, aged 22. Her parents were supporting her financially after her dismissal. She had engaged in post dismissal conduct toward her former colleagues which displayed poor judgement. The working environment of the emergency dispatch room required an ability to focus on urgent issues without distraction, where a life or death situation could arise. Finally, but significantly, the employer had conducted an investigation into specific allegations that Ms Adams had

been able to respond to and explain. None of these features characterise the situation that Mrs Taylor finds herself in. Although a carefully crafted remedy will need to be ordered to help to make Mrs Taylor's interim reinstatement work, the circumstances prevailing in the school environment are more propitious to success and would be more likely to enable the parties to fully discharge their responsibilities in the employment relationship than was possible in Ms Adams' case.

Factors favouring the applicant

[122] Mrs Taylor refers in her affidavits to the damage to her reputation and career by her sudden removal. She refers to the publicity that her removal has attracted in the local and national media. This publicity does not seem to have been negative towards her hitherto, but there can be no school in the land that does not know about her summary dismissal. Inevitably, some damage will accrue to her reputation as a principal as a result.

[123] I do accept that harm is likely to be done to Mrs Taylor's prospects of securing new employment as a principal as things stand at present. Whilst the substantive investigation into her dismissal is likely to take place in early February 2013, the Authority's determination will not be likely to be released until mid February at the very earliest, possibly up to a month later dependant upon when submissions are received. That timeframe would mean that, if the Authority were to order reinstatement at the end of the substantive investigation, it would be much more difficult for both the school and Mrs Taylor to comply with such an order, probably rendering it more unlikely. In the meantime, uncertainty about the reasons for Mrs Taylor's dismissal would continue to prevail in the minds of prospective employers.

[124] In terms of this potential damage to Mrs Taylor's reputation and career prospects, I believe that damages would not be an adequate remedy, if she were to succeed in her personal grievance claim. She is approaching the last few years of her career as a principal, and it is certainly possible that she would find it very hard to find an alternative suitable position. Effectively, her career as a high school principal in New Zealand could well have been damaged beyond repair by the summary dismissal of her by the Board. In such a case, damages would not be adequate to compensate her.

[125] Finally, Mrs Taylor has deposed that she will have no income after Christmas, when the two months' ex gratia payment runs out. She is a widow with, I infer, no other source of income. Given the probable relatively close proximity of a substantive determination, however, I do not believe that Mrs Taylor is likely to be seriously prejudiced by what could be a two to three month period without pay.

Summary

[126] In summary, when balancing the respective potential prejudice to the parties, whilst the issues are finely balanced, I am satisfied overall that the potential prejudice to Mrs Taylor of not being granted interim reinstatement outweighs the potential prejudice to the respondent and the school of it being granted.

Where does the overall justice of the case lie?

[127] I must now stand back and examine the overall justice of the case. I believe that the following are materially relevant factors to take into account. First, there is a strongly arguable case that the dismissal was unjustified. Second, whilst Mrs Taylor's approach to her senior staff have clearly caused them to be disgruntled, Mrs Taylor has not had the opportunity to formally address these issues and rectify her behaviour through the means that should have been implemented (namely, the performance agreement and the section 78L action plan). Third, the manner of the dismissal is likely to have caused Mrs Taylor significant damage to her reputation and career. Fourth, there appears to be a level of personal animosity towards Mrs Taylor from members of the Board which may well have obscured the proper discharge of their functions and duties as an employer. It would not be just to take at face value the respondent's argument that trust and confidence has broken down between Mrs Taylor and the Board, when there is evidence to suggest that the Board has been at least partially responsible for that breakdown. Finally, there appears to be no cogent evidence of misconduct by Mrs Taylor that would have justified her summary dismissal.

[128] Taking all these factors into account, and in particular the overriding duty of the parties to be active and constructive in establishing and maintaining a productive employment relationship, I am satisfied that the overall justice of the case requires the interim reinstatement of Mrs Taylor.

Conclusion

[129] I conclude that the requisite tests for interim reinstatement have been satisfied in this matter. However, there are conditions that need to be complied with in order to give the reinstatement a chance to succeed. First, I believe that it would not be helpful to the smooth wind down of this school year for Mrs Taylor to step back into school life immediately. If she did, a flurry of media attention is very likely to ensue which would distract the staff and the students. For this reason, although I

will order the immediate interim reinstatement of Mrs Taylor to her employment, I will allow the Board to decide whether it requires her to remain away from the school premises and events until after the current school term has finished.

[130] Second, the performance agreement and the action plan must be allowed to be implemented to assist all parties to repair what has become a rift in the smooth running of senior staff relationships.

[131] Third, meetings need to take place between Mrs Taylor and each staff member who has identified themselves as having concerns about her return. These meetings should be facilitated by an independent, external and experienced facilitator.

[132] Finally, the Board and Mrs Taylor need to make every reasonable effort to come up with a means to allow themselves to work together effectively and professionally.

[133] All of these steps need to be achieved urgently, and as far as is reasonably practicable, before the start of the new school year.

Orders

[134] I make this order in reliance on Mrs Taylor's undertaking as to damages under

section 127 (2) of the Act.

[135] I order that the respondent reinstate Mrs Taylor to her position as principal of the school on an interim basis with immediate effect, subject to the following conditions:

a. The Board may, if it thinks necessary to do so, require Mrs Taylor to remain away from the premises and events of the school, until no later

than the day immediately following the last day of the current school term.

b. The Board is to take urgent steps to finalise and implement a suitable performance agreement as contemplated by Mr Allen in his appraisal report dated November 2011, which will make clear the objectives that the Board reasonably require Mrs Taylor to achieve during the forthcoming new school year.

c. The Board is to take urgent steps to implement the section 78L action plan that was drawn up and approved by the Secretary of Education earlier this year, or such other action plan that the Secretary of Education may subsequently require the school to adopt.

d. The Board is to take urgent steps to engage an independent external and experienced facilitator who will be instructed to facilitate urgent meetings between Mrs Taylor and each member of staff who has expressed concerns about Mrs Taylor's return to the school. Such meetings are to be conducted in the manner recommended by the facilitator, subject to the individual wishes of each staff member. The meetings should take place, as far as is practicable, prior to the commencement of the 2013 school year.

e. Mrs Taylor shall co-operate with the recommendations of the facilitator as to how to work constructively and professionally with each such staff member.

f. The Board, or such sub committee of members of the Board as they think fit, is to devise urgently a strategy and protocols, in consultation with Mrs Taylor, to assist it to work constructively and professionally with Mrs Taylor. They are then to work in accordance with such strategy and protocols.

g. Mrs Taylor and the members of the Board are to comply at all times with their duties of good faith in their dealings with one another.

[136] I direct the parties to take part in, on an urgent basis, and in any event before the commencement of the 2013 school year (subject to the availability of a mediator) mediation with a member of the Mediation Services.

[137] The substantive investigation into the personal grievance has been set down for the week commencing Monday 4 February 2013. A telephone conference will be held to agree dates for the exchange of evidence and other matters of relevance.

Costs

[138] Costs are to be reserved until the conclusion of the Authority's substantive

investigation of the matter.

David Appleton

Member of the Employment Relations Authority

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