

unsafe and unhealthy. Mr Edmonds believed the pool was safe for the children to swim in.

[4] On Monday 12 February 2007 Mr Bird approached Mr Edmonds and discussed the use of the pool the previous week. Mr Bird advised Mr Edmonds that he was going to issue him with a formal warning as he did not accept his explanation.

[5] Later that same day two teachers advised Mr Bird that they were unhappy with the condition of the pool on the previous Friday. Ms Lisa Bird also advised Mr Bird that she had spoken to Mr Edmonds about the murky water at about lunch time the previous Friday and suggested he shut it down, but he refused to do so.

[6] Mr Bird considered he had been lied to and misled about the readiness of the pool and that this abused his trust and that of the staff and the children. Mr Bird considered Mr Edmonds actions as being intolerable and indefensible.

[7] On Tuesday 13 February Mr Edmonds was dismissed for dereliction of his swimming pool duties, misleading staff and Mr Bird about the state of readiness of the pool for swimming, and exposing children to a health and safety risk by allowing them to swim in the pool while the water was murky. The decision to dismiss was subsequently ratified by Te Poumarumaru (the Board).

[8] Mr Edmonds claims his dismissal was unjustified and seeks remedies. The Kura denies the dismissal was unjustified. Mr Edmonds also claims the Kura acted in breach of its employment agreement, in particular the provisions in clause 6.8 which sets out the steps to be taken when dealing with disciplinary and dismissal matters. Mr Edmonds seeks a penalty against the Kura for this breach.

[9] There is no dispute that Mr Edmonds was dismissed. The key issues for this determination are:

- was the dismissal justified;
- what, if any, remedies will be awarded;
- did the Kura breach the collective employment agreement;
- if there was a breach, should a penalty be awarded.

Was Mr Edmonds unjustifiably dismissed?

[10] Pursuant to section 103A the Authority must scrutinise the Kura's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[11] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[12] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

Serious misconduct

[13] Mr Edmonds was dismissed for serious misconduct. The law relating to serious misconduct is well settled. The definition of the kind of conduct that would justify summary dismissal is not possible, for it is always a matter of degree. What is usually needed is conduct that deeply impairs or is destructive of the basic confidence or trust that is an essential element of the employment relationship (see *Northern Distribution Union v BP Oil NZ Ltd* [1990] 3 ERNZ 483).

[14] The reasons for Mr Edmond's dismissal are set out in a letter dated 15 February 2007:

- failing to have the school pool ready on 7 February;
- misleading staff and Mr Bird about the condition of the water;

- exposing children to real health and safety risks by allowing them to swim.

Failing to have the school pool ready on 7 February

[15] Mr Edmonds' undisputed evidence is that he was away on leave from the school from 3 to 6 February and so was unable to guarantee the pool would be ready for swimming on 7 February. The evidence is that the pool was green on the Wednesday.

[16] Mr Edmonds receives an allowance for carrying out work on the swimming pool. His timesheets, produced to the Authority for the months of January and February 2007, show that Mr Edmonds claimed to have been working on the pool on no less than six days in the period leading up to his leave in early February. This evidence is in contrast to his written evidence that his "...duties during school holidays did not include swimming pool maintenance."

[17] I have concluded that had Mr Edmonds been working on the pool on all of the days he has claimed in his timesheets, then it would be highly unlikely the pool would have been green on Wednesday 7 February 2007.

[18] However, the fact of the matter is, Mr Edmonds was expected to have the pool ready for swimming on the first day of school. He has failed to carry out his duties in a way that met that obligation.

Misleading staff and Mr Bird about the condition of the water

[19] Mr Bird met with Mr Edmonds on Thursday 8 February. During that meeting Mr Edmonds advised Mr Bird that the pool would not be available for swimming that day but that he would work on it and have it ready the next day, Friday 9 February.

[20] The next morning Mr Edmonds advised Mr Bird that the pool was ready for use. The evidence is that the condition of the pool deteriorated once the tamariki started swimming in it. As they swam they stirred up sediment from the bottom of the pool which caused it to go cloudy and murky. The condition of the pool was brought to Mr Edmonds attention at or around lunch time as Mr Edmonds was leaving for his 2 hour break.

[21] Later that afternoon, at about 3.00pm Mr Bird checked the pool where two teachers had their own tamariki swimming. Mr Bird was not satisfied the pool looked safe to swim in and instructed the two teachers to stop using the pool.

[22] Ms Lisa Bird says that on Friday 9 February, she instructed Mr Edmonds to close the pool and that he refused. I am not satisfied the evidence demonstrates that a clear instruction was given to Mr Edmonds to close the pool. However, I am satisfied the cloudiness of the pool was raised with him and that Mr Edmonds chose to ignore the advice that the pool water was not clear.

[23] On Monday morning 12 February, after witnessing the state of the pool on the Friday afternoon Mr Bird says he was going to issue Mr Edmonds with a written warning and advised him of this. However, after being approached by Ms Anderson and Ms Bird during the day on Monday Mr Bird concluded that Mr Edmonds had misled him and lied to him.

[24] I am not satisfied Mr Bird has shown that Mr Edmonds misled him as to the state of the pool. Mr Bird himself saw the state of the pool on the Friday afternoon and told the two teachers swimming there after school to get out, however, I am satisfied that when Mr Edmonds told Mr Bird on the Friday morning that the pool was ready, Mr Edmonds had no reason to believe it was not.

[25] When Mr Bird spoke to Mr Edmonds about the state of the pool on the Monday morning, Mr Edmonds reiterated his view that when he told the teachers it was ready for swimming in the morning, the water was clean and clear. The fact that the pool was clear in the morning is supported by Ms Anderson who confirms that the pool looked clear to her before her tamariki started to swim. However, once the tamariki started swimming in the pool sediment from the bottom of the pool was stirred up and the water then became cloudy and murky.

Exposing children to real health and safety risks by allowing them to swim

[26] Mr Bird says Mr Edmonds exposed the children and staff to a health risk by allowing them to swim in murky water.

[27] The teachers each had responsibility for their own classes while using the school swimming pool. Ms Anderson chose to take her tamariki out of the pool before they had finished their allotted swimming time due to the safety risks of swimming in murky water and another teacher chose not to swim her tamariki that day at all. Ms Anderson had the authority to close the pool if she felt there was a risk to the children's safety but did not close the pool.

[28] Clearly, once the pool started being used and the water turned cloudy and murky, the pool became a hazard. Once it was brought to his attention Mr Edmonds ought to have closed the pool. He did not take that step and ignored the advice from Ms Bird that the pool ought to be closed.

[29] In coming to his conclusions as to the level of misconduct, Mr Bird relied on information provided by Ms Anderson and Ms Bird on Monday 12 February. It was as a result of this information that Mr Bird determined he had been misled and lied to by Mr Edmonds. I have found that Mr Edmonds had not misled Mr Bird as to the state of readiness of the pool on the Friday morning.

[30] I am not satisfied the Kura has shown Mr Edmonds actions on Friday 9 or Monday 12 February amounted to serious misconduct. At best Mr Edmonds is guilty of not performing his job to the standard expected by his employer and may constitute misconduct.

Contractual obligations

[31] Mr Edmonds and the School were bound by the terms of School Caretakers' and Cleaners (including Canteen Workers) Collective Agreement 2006. The Collective Agreement at clause 6.8 details the principles to be followed when dealing with discipline and dismissal matters. Summarised, these include requirements that:

- an employee must be advised in writing of specific matters causing concern and given a reasonable time and opportunity to provide an explanation;
- an employer, before making a final decision, may need to make further inquiries to be satisfied of the facts of a matter causing concern;

- an employee must be advised of the right to request representation at any stage;
- where there is a requirement to advise of any corrective action, there be a reasonable opportunity to amend conduct;
- if an allegation is sufficiently serious, an employee may be suspended pending further inquiry and, in most cases, on pay; and
- the employer will record the process and any disciplinary action to be taken and will have this record sighted and signed by the employee and placed on the employee's personal file.

[32] While clause 6.8.2 allows for appropriate modifications of these principles where summary dismissal may occur as a result of finding serious misconduct, as stated by the Chief Judge in *The Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*, unreported, 16 May 2008, Colgan CJ, AC14/08, this statement does not "...go so far as to negate any or all of the other requirements of fair process in all cases."

[33] At the investigation meeting Mr Bird conceded that he did not follow any of the steps set out at clause 6.8 of the collective agreement when he made the decision to dismiss, or in the implementation of that decision.

[34] On Monday 12 February Mr Bird met with Mr Edmonds and confronted him about the condition of the pool the previous Friday. Mr Edmonds provided an explanation as to why the pool had gone from being clear to being murky and cloudy. Mr Bird did not accept Mr Edmonds explanation and told Mr Edmonds that he would be issuing him with a written warning.

[35] Following that meeting, Mr Bird spoke to two teachers about the state of the pool. Ms Bird told Mr Bird that she had instructed Mr Edmonds to close the pool on the Friday but that he had disregarded her instruction. Mr Bird formed the view at this point, that Mr Edmonds had mislead him with regard to the state of the pool.

[36] Without putting any of the new information to Mr Edmonds, Mr Bird spoke to several members of Te Poumarumaruru and advised them of his concluded view that Mr Edmonds was negligent in the performance of his duties and had mislead him over the state of readiness of the pool. Mr Bird advised the members of Te Poumarumaruru of

his view that Mr Edmonds conduct was so serious that he should be dismissed. The members of Te Poumarumaruru consulted with that day, agreed with Mr Bird's decision to dismiss Mr Edmonds. At this point, Mr Edmonds fate had been decided.

[37] Without any regard to the procedures outlined in the collective agreement Mr Edmonds was required to attend a meeting on Tuesday 13 February, where he was advised of the decision to dismiss him. Mr Edmonds, unhappy with the advice that he had been dismissed, left the meeting. Mr Bird in his written evidence told the Authority that he was prepared to listen to any explanations offered by Mr Edmonds and that he wasn't set on the idea of dismissing him. That information was never provided to Mr Edmonds before or during the meeting on 13 February.

[38] In submissions counsel for the Kura argued that this was one of those rare occasions when the Kura was entitled to dismiss without further enquiry. I do not accept that submission. The contract between the parties sets out the requirements of the Kura when dealing with disciplinary and dismissal matters. Mr Edmonds was entitled to expect those procedures to be followed.

[39] I find the Kura summarily dismissed Mr Edmonds and that the dismissal was unquestionably unjustified. The dismissal was not attended by any processes that would be followed by a fair and reasonable employer in these circumstances. Such a process would have included Mr Bird following the requirements of the collective agreement as a minimum. Mr Edmonds is entitled to remedies for his unjustified dismissal.

Remedies

Contribution

[40] Section 124 of the Act requires the Authority to reduce remedies where blameworthy conduct of the employee contributed to the situation giving rise to his personal grievance.

[41] I have found earlier in this determination that the conduct of Mr Edmonds did not reach the threshold of serious misconduct. However, I am satisfied there were elements of misconduct and this is to be taken into account in determining remedies.

[42] The Kura has identified a number of issues relating to the state of repair of the pool which it says were discovered post dismissal. The maintenance of the swimming pool equipment and machinery were an integral part of ensuring the swimming pool was safe to use by tamariki and teachers and I have taken this into account when considering contribution. (see *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] 1 ERNZ 155).

[43] Standing back and taking into account Mr Edmonds contribution overall, I consider a reduction for contribution of 20% is required.

Lost wages

[44] Mr Edmonds is entitled to reimbursement of wages lost as a result of the unjustified dismissal. Mr Edmonds however, must show that he has attempted to mitigate his loss. Mr Edmonds evidence is that he commenced new employment on 1 September 2007, however there was very little other evidence as to his attempts to find alternative employment.

[45] Mr Edmonds is to be reimbursed for three months lost wages at the rate of \$494.00 gross per week. The amount payable shall be reduced by 20% for contribution.

Te Kura Kaupapa Motuhake o Tawhiuau is ordered to pay to Mr Edmonds \$5,137.60 gross being 13 weeks lost wages pursuant to section 123(1)(b) of the Act within 28 days of the date of this determination.

Compensation

[46] Mr Edmonds is also entitled to compensation for humiliation and loss of dignity and injury to feelings. I assess this at \$5,000 (subject to a reduction for contribution). I accept that a dismissal in a small community such as Murupara where the community are all well known to each other and in some cases, related, will have a particularly embarrassing and hurtful effect. In this case Mr Edmonds humiliation was exacerbated by a public announcement of his dismissal in the newsletter sent to the parents of the kura.

Te Kura Kaupapa Motuhake o Tawhiuau is ordered to pay to Mr Edmonds \$4,000 pursuant to section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Application for a penalty

[47] Mr Edmonds seeks a penalty for the Kura's breach of clause 6.8 of the employment agreement pursuant to s.134 of the Act.

[48] Mr Bird admitted at the investigation meeting that he knew Mr Edmonds was a union member, knew about the collective agreement and clause 6.8 but ignored it. I find in this case that the breach of the agreement was deliberate and a penalty in the sum of \$1,500 is warranted. I direct under section 136(2) of the Act that the whole of that penalty be paid to Mr Edmonds.

Te Kura Kaupapa Motuhake o Tawhiuau is ordered to pay to Mr Edmonds \$1,500 pursuant to section 134 of the Act within 28 days of the date of this determination.

Costs

[49] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Edmonds may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority