IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Auckland 45
5343966

BETWEEN	EMMA FOX Applicant
A N D	HEREWORTH SCHOOL TRUST BOARD Respondent

Member of Authority:	James Crichton
Representatives:	Dr Stephen Fox, Advocate for Applicant Stuart Webster, Counsel for Respondent
Investigation Meeting:	4, 5 and 6 September 2012 at Hastings
Date of Determination:	8 February 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Fox) alleges that she was unjustifiably dismissed by the respondent (Hereworth School) on 12 January 2010. Hereworth School resists that claim.

[2] Ms Fox was employed at the beginning of the 2008 school year as a classroom teacher in the junior school.

[3] On 17 July 2009, Shirley Cameron, the Associate Headmaster responsible for the junior school, approached Ms Fox to discuss issues that had been raised with her (Ms Cameron) by parents about apparent differences in grading between teachers in the junior school, including Ms Fox. In essence, Ms Fox understood it was being contended that children had not progressed since leaving her classroom.

[4] There was a discussion between the two teachers. Their recollections of that discussion are different with Ms Fox saying that Ms Cameron asked her to alter her 2008 end-of-year reports retrospectively *"so it didn't look as if the children had declined in progress since leaving* [Ms Fox's] *classroom"*, and Ms Cameron saying that all she was doing was endeavouring to ensure that Ms Fox was following the standard marking practice determined previously by the syndicate.

[5] Ms Fox then sent an email to all teaching staff about the wider issue of benchmarking of student assessment.

[6] There was another discussion between the two teachers on 20 July 2009, on the same subject. Again, their recollections of that discussion are different.

[7] On 22 July 2009, Ms Fox met with the Headmaster, Mr Scrymgeour to discuss her concerns with the two engagements with Ms Cameron. Ms Fox subsequently emailed her concerns to Mr Scrymgeour and a meeting was set up for 29 July 2009 at which Mr Scrymgeour was going to facilitate a discussion between Ms Fox and Ms Cameron. The meeting did not proceed. Initially, both Ms Fox and Hereworth School thought the matter could be left in abeyance (Ms Fox was about to commence a period of maternity leave), but then by email dated 29 July 2009, Ms Fox expressed a wish for the proposed meeting to proceed.

[8] On 11 September 2009, Mr Scrymgeour advised that he was engaging an independent consultant to investigate the issues and that consultant, Mr Douglas Abraham, then contacted Ms Fox. Mr Abraham did not disclose to Ms Fox at that time that he was the Vice Chairman of the Hereworth School Board.

[9] Mr Abraham subsequently issued a letter dated 26 September 2009 traversing the matters in contention and in subsequent correspondence dated 29 September 2009, Mr Abraham included the observation *"if you elect to discuss these matters externally, you do so at your own peril"*.

[10] The Hereworth School sought to facilitate a meeting between its Board and Ms Fox but various impediments prevented that meeting from taking place. Mediation assistance from the Department of Labour was sought by Hereworth School but was unable to be arranged. Subsequently, Ms Fox's failure to attend on the Board at a meeting on 18 November 2009 resulted in her being given a disciplinary warning.

[11] The Hereworth School Board made a further attempt to convene a meeting between Ms Fox and itself on 18 December 2009 but by this stage Ms Fox had left the district and indicated she would be unable to attend the meeting at the time scheduled for logistical reasons.

[12] On 21 December 2009, Hereworth School notified Ms Fox of an interim decision to summarily dismiss her for serious misconduct in respect of a number of issues set out in a letter to Ms Fox of that date.

[13] Ms Fox was given until 11 January 2010 to respond to that interim decision and that opportunity was taken by Ms Fox. Notwithstanding that, on 12 January 2010, Hereworth School dismissed Ms Fox from its service.

Issues

[14] It will be helpful if the Authority considers the factual matrix under the following broad headings:

(a) The grading issue;

(b) The Abraham investigation;

(c) Subsequent events.

The grading issue

[15] It is common ground that there was a discussion between Ms Fox and Ms Cameron on 17 July 2009. Ms Cameron is Hereworth School's Associate Headmaster and as such is responsible for the junior school where Ms Fox taught. While it is common ground that the discussion took place, everything else appears to be in dispute.

[16] Ms Fox says that Ms Cameron approached her to discuss issues that had been raised by parents about apparent differences in grading of students within the junior school. Ms Fox thought it was being suggested that children previously taught by her had not progressed in the ensuing part year in the school.

[17] Ms Fox's evidence is that she felt her professional integrity was being questioned when, in effect, she was being asked by Ms Cameron to justify marking of students at the end of the 2008 school year which on the face of it, did not marry well

to the results achieved by those students in the first half of the 2009 school year, with another teacher.

[18] Contrary to Ms Fox's interpretation of the discussion, Ms Cameron was very clear in her evidence that all she was endeavouring to do was to ensure that previously agreed protocols amongst the teaching staff as to how to rank students, were being followed by Ms Fox. Her evidence was that she wanted to establish if Ms Fox *"remembered/followed our syndicate's decision to double tick when children were performing well above the expected achievement at this level … we discuss as a group so there is consistency"*.

[19] By contrast, Ms Fox maintained that Ms Cameron disagreed with the way that she had graded some students and critically for our purposes Ms Fox maintained that she was asked by the Associate Headmaster to *"change her* [Ms Fox's] *2008 end of year reports retrospectively so that it did not look like these boys had declined in progress since leaving her* [Ms Fox's] *class"*. Ms Fox's evidence is that she declined to make the change sought and terminated the conversation.

[20] Conversely, Ms Cameron was adamant that she was simply trying to ensure that the previously agreed syndicate practice was being followed by Ms Fox given that parents had raised with her issues around the consistency of marking and therefore ranking of their sons as between the two teachers. Ms Cameron absolutely denied both to Mr Scrymgeour, the Headmaster, and on affirmation to the Authority that she had instructed Ms Fox to make retrospective changes or indeed that she had said anything that would have encouraged Ms Fox to think that that was what she was seeking. Ms Cameron made the fairly self-evident observation that the parents already had a hard copy of the 2008 school report for their sons and so there could have been no possible benefit, either to the school or to her, in having retrospective changes made. All she was seeking to do, on her evidence, was to establish if Ms Fox was following the agreed protocol, or not. If she was not following the agreed protocol, then Ms Cameron was intent upon encouraging Ms Fox to fall into line with everyone else in the syndicate in order to establish consistency. One of the explanations for the apparent difference in the grading of students between 2008 and 2009, is that the agreed marking standard was not being followed by one of the markers.

[21] Whatever the truth of this conversation, it seems apparent to the Authority that it started a whole chain of events which caused untold distress, not only to the parties to this litigation but also to members of the wider school community. What should have been no more and no less than at worst a professional disagreement, developed a life of its own such that allegations of dishonesty and various forms of impropriety became a commonplace as the dispute escalated.

[22] For the avoidance of doubt, while nothing turns on which recollection of events is to be preferred, the Authority's clear view is that Ms Fox was absolutely mistaken in the view that she formed about the conversation she had with Ms Cameron on 17 July 2009. The reason that the Authority reaches that conclusion is not so much because of issues of credibility as between the two protagonists, because both impressed the Authority as straightforward and forthright, but rather because the Authority is not persuaded there would have been anything to gain either for Ms Cameron personally or for Hereworth School in general in the alteration which Ms Fox says she was asked to attend to.

[23] If, as Ms Fox believed, she was being asked to retrospectively change marks, that exercise would have been absolutely pyrrhic because the hard copy of the end of year report for 2008 would have retained the original mark and ranking which Ms Fox had determined for the student and would have been in the possession of the parents for fully six months before the alteration was allegedly sought by Ms Cameron.

[24] The Authority thinks it much more likely that Ms Cameron sought only, as she herself says, to ensure consistency and if there was any sense in which Ms Fox was failing to follow the previously agreed protocols, to ensure that that process was followed. Furthermore, given that there were unexpected differences in ranking of students at the end of 2008 measured against the middle of 2009, Ms Cameron as the head of the syndicate was inviting Ms Fox to justify the 2008 mark.

[25] By asking a staff member to justify the mark that they had given a particular student, a supervising teacher might be seen to be encroaching onto the professional territory of the teacher responsible for the original mark. In that respect anyway, Ms Fox might have felt that her professional integrity was, if not being questioned, at least being reviewed. But of course whatever the professional judgements of individual teachers may be about their students, the fact remains that teaching is a team game and it is difficult to see how a teacher who is not prepared to work

collaboratively with other teachers can succeed in the profession, or at least in that part of the profession which is involved in the operation of the school system.

[26] As the head of the junior school, the Authority is satisfied that Ms Cameron has an absolute right as the representative of the employer to seek to ensure consistency of marking across the syndicate and insofar as she sought to ensure that Ms Fox was conforming to the previously agreed syndicate processes on the marking of students, she was, in the Authority's considered opinion, well within her rights. It can only be a source of profound regret to all concerned that Ms Fox took exception to what the Authority is satisfied was a perfectly ordinary management request.

[27] In Ms Fox's email to the whole staff about the issue of benchmarking of student assessment which she sent on 20 July 2009, Ms Fox effectively highlights the difference between her practice and the agreed Hereworth School practice for the junior school. If as Ms Fox maintains, this email was innocently sent and simply designed to encourage a professional discussion about a technical pedagogical issue, it is certainly not seen in that way by Hereworth School. So far as the school is concerned, if Ms Fox had an issue with the way in which her syndicate was apportioning marks, then the proper course of action was to address the matter directly to Ms Cameron. By effectively publicly exposing the difference between Ms Fox and the syndicate practice generally, the school view is that she is again exhibiting her unwillingness to be, to put it colloquially, "a team player". Certainly Ms Cameron was absolutely exasperated by the circulation of the email and there were a number of other negative responses to it as well, such as from the Deputy Headmaster, Mr Exeter.

[28] Interestingly, in responding to Mr Exeter's email about Ms Fox's broadcast style of communication, Ms Fox has this to say:

> *Following our impromptu meeting yesterday … where you expressed your views to me that you didn't agree with the way I sent the two emails* [there was another subsequent email as well as the one the Authority is presently referring to] *to the whole teaching staff … when how you perceived it, it was a dispute between two people … the issue must not be minimised to a dispute between two people – that is a separate matter being addressed. The three issues on the email were raised by me to the whole teaching staff because there are fundamental changes that do need to occur, and I wanted the staff to have a chance to think about how this could be done and perhaps contribute, before it is discussed in a staff meeting.*

[29] In the Authority's view, this observation by Ms Fox in her email to Mr Exeter on 29 July 2009 is a revealing insight into her conviction that her view was to be preferred over other views. She says in the email that *"there are fundamental changes that do need to occur"*. That is plainly her view; the school might be forgiven for saying that, in respect of the particular issue that Ms Fox appears concerned about, the school has already formulated its view, and that view is the view of the junior school syndicate and if there were to be a change in the way in which those rules were to apply, then the place for that discussion to take place at first blush was within the junior school syndicate.

[30] Of course, Ms Fox's broadcast email encouraged Ms Cameron to speak with Ms Fox again. This happened on Monday, 20 July 2009. Ms Fox says that Ms Cameron again asked her to retrospectively change the reports. That is inconsistent with Ms Cameron's recollection of the discussion which was primarily around Ms Cameron's obvious frustration at Ms Fox's broadcast email. In her evidence to the Authority, she included these words:

> *… she did not follow any procedure of talking to her manager – me or my manager, Ross* [Mr Scrymgeour].
>
> *I then went and saw her personally – and said I was now discussing with other staff her email when it should be with her. You should not "cc" other staff in emails about management.*

[31] Ms Cameron did seek, in that discussion on 20 July 2009, the backup raw data to justify the marks that Ms Fox had granted the various students; the Authority is satisfied that that is absolutely within Ms Cameron's prerogative as the head of the syndicate.

[32] Two days later, on 22 July 2009, Ms Fox met with the Headmaster, Mr Scrymgeour, to discuss her concerns with the contacts she had had with Ms Cameron. Both accounts of that discussion suggest a reasonably low key and informal exchange between the parties. Ms Fox then emailed the issues of concern to her to the Headmaster and a meeting was set up for 29 July 2009 at which, in essence, Mr Scrymgeour was going to facilitate an engagement between Ms Fox and Ms Cameron. The Authority must observe that had that meeting taken place at that time with Mr Scrymgeour as moderator, much of the subsequent disputation between the parties might have been avoided.

[33] But the meeting did not take place and as the Authority has already noted, initially both parties seem to have been of the view that it was unnecessary to resolve the matter at the end of term, especially as Ms Fox was about to go on maternity leave. However, the situation changed when Ms Fox had a falling out with another teacher and she immediately requested that the meeting proceed as planned.

[34] Despite that request, the meeting did not take place, Ms Fox went on maternity leave and it is clear from the evidence of Hereworth School that while she was on maternity leave, the Headmaster, Mr Scrymgeour, became increasingly concerned about what seemed to him to be the escalation in the difficulties in managing Ms Fox within the school's confines. Having reflected on those challenges, Mr Scrymgeour made the fateful decision to engage a member of his own Board as a "independent" investigator.

The Abraham investigation

[35] Ms Fox emailed Mr Scrymgeour on 11 September 2009 making a further request for a meeting to discuss the outstanding issues and specifying a date and time (8 October 2009 at 2pm). Mr Scrymgeour's response was to confirm that he had *"engaged an independent consultant"* to investigate *"some of the issues you raised"*. Mr Scrymgeour indicated he would come back to Ms Fox to confirm a meeting time.

[36] Ms Fox's response was dated the following day and made the point first that if there was an independent consultant appointed, it should have been by agreement with her as well. She then said that she had heard nothing from the consultant and she then made a further demand for *"a denial, explanation or apology in writing by those concerned as previously requested on more than one occasion"*, and if that was not forthcoming *"I will be escalating the issue"*. The demand for apologies or denials or explanations repeated an earlier theme in previous emails from Ms Fox wherein she chose to adopt a fixed and confrontational style rather than engage collaboratively with Hereworth School with a view to finding a mutually agreeable solution.

[37] That said, Ms Fox is quite right to make the point that she does about the independent consultant. If the school had in its mind the concept of a genuinely independent person to conduct an investigation into the matters complained of, then in all good conscience it ought to have sought to get Ms Fox's agreement both to the process and to the individual identified to do the work. In the absence of those

commitments, the Authority is satisfied the consultant could not be genuinely seen as an independent party.

[38] What is worse though, is that the person Hereworth School identified to do the investigation was not only not independent in the sense that he was agreed to by both parties, but even on the narrower basis that he was independent by reason of not being partial, the appointment also failed.

[39] The school appointed Mr Doug Abraham to undertake the investigation. Mr Abraham is an employment relations adviser specialising in working for employers and were it not for one salient factor, Mr Abraham might well have been an ideal person to be considered for such inquiries. The salient factor that the Authority refers to is the fact that at the time that Mr Abraham was asked to undertake the task, he was the Deputy Chair of the Hereworth School Board and more than that, was the Hereworth School's first agent as the employment relationship problem with Ms Fox continued to develop. By way of example in respect of that second point, it was Mr Abraham who initially undertook inquiries on behalf of Hereworth School with the Mediation Service of the Department of Labour in Napier with a view to trying to arrange mediation between the school and Ms Fox. It is difficult to imagine a more partial situation than that.

[40] The Authority is absolutely satisfied that the issue with Mr Abraham's involvement has nothing to do with his competence but has to do with the school's insistence that Mr Abraham was somehow "independent". Mr Scrymgeour uses that word in communicating with Ms Fox by email and it was the representation of Mr Abraham as "independent" which ensured that whatever work he accomplished would be misunderstood.

[41] Quite clearly, this was a situation which cried out for a genuinely independent person who could come to the inquiry without any possibility of being criticised for partiality. Mr Abraham's work was always going to be subject to the charge that, as the Deputy Chair of the Board and as the school's first advocate in the matter, he was simply not impartial.

[42] Not only was that a problem but the extent of Mr Abraham's brief was also an issue. Ms Fox did not understand the extent of the inquiry to be made by Mr Abraham and given the fact that Hereworth School did not bother to tell her what

Mr Abraham was tasked to do, that was not surprising. Ms Fox complained, understandably in the Authority's view, that Mr Abraham had no educational experience and was therefore unable to deal with some of the issues that were in dispute. But, from the school's perspective, the only matters that it wanted Mr Abraham to engage in were the interpersonal disputes between Ms Fox and other staff. So far as the school was concerned, the educational issues were not up for investigation.

[43] Nor was Ms Fox clear, again because the school did not make it clear to her, about the process of investigation that Mr Abraham was asked to undertake. She protested, understandably in the Authority's opinion, that Mr Abraham did not appear to be going to interview her and was also not going to interview the children involved. The issue of the interview of the children is obviously a controversial one; the school took the view that it was completely inappropriate in any circumstances and it may well have been right, but the point for the purposes of the employment relationship problem is that it did not communicate with Ms Fox at any time about the extent of Mr Abraham's inquiries, particularly around whether Mr Abraham was going to talk to Ms Fox or not. As a protagonist in the issue, Ms Fox could be forgiven for forming the view that she was entitled to be consulted, and yet she was not.

[44] The reason that she was not consulted was because that was not part of Mr Abraham's brief, but as the Authority has already made clear, Ms Fox ought to have been told what his brief was and she was not. What Mr Abraham was instructed to do, according to Mr Scrymgeour's evidence to the Authority, was that he *"... would gather together the important issues so that they could be put to Emma* [Ms Fox] *and for her to respond to them"*. So there was never any intention of Mr Abraham engaging directly with Ms Fox, only that he was going to talk to the other protagonists and then the results of those inquiries would be put to Ms Fox in some forum or other and she would have an opportunity to respond.

[45] It is not, of course, for the Authority to lecture employers about how they should conduct investigations, but the Authority must assess the quality of investigations when they are brought into sharp focus by an employment relationship problem such as this one. The Authority's considered view is that this inquiry by Mr Abraham was wrong-headed from the start. It was wrong-headed by being portrayed as "independent" when it plainly was not; it was wrong-headed when the

process to be used was not adequately communicated to one of the protagonists in any adequate fashion; and it was wrong-headed when it sought to effectively collect evidence about one side only of the argument rather than assemble a balanced view of all the salient facts from both sides of the argument. The difficulties between these parties would have been so much easier to resolve if the employer had avoided all of the pitfalls the Authority has just identified.

[46] Furthermore, if the employer was, for instance, unable to obtain Ms Fox's commitment to a joint independent inquiry, as may have been the case, there would be nothing to prevent the employer conducting its own investigation to inform its own behaviour. But by representing the inquiry as an independent one and by failing to communicate its terms to the other protagonist, and by limiting those inquiries to what looks like the assembling of a case against Ms Fox (even if that is not the intention), it creates an entirely unsustainable edifice.

[47] From that unprepossessing situation, matters could only deteriorate, and they did. Mr Abraham wrote to Ms Fox by email dated 26 September 2009 in which he set out in some detail the issues as he saw them and the various responses. He concludes by reciting the fact that Ms Fox had sought a meeting (the one on Thursday, 8 October 2009 at 2pm), and then seeking a raft of information from Ms Fox to justify various allegations or statements that she had previously made, all of this to be provided in advance of the meeting that she had requested. The conclusion to the letter is in the following terms:

> *Kindly refer any response and communications to the writer. When we have received the information requested, the investigation will be reviewed and you will be advised of when and why a meeting will be scheduled.*

[48] Given the foregoing analysis, it is not surprising to the Authority that Ms Fox did not respond to that communication but instead sent an email to Mr Scrymgeour. She sought information from Mr Scrymgeour about Board members' addresses. She did this because she considered that Mr Abraham had been engaged, not by the Hereworth School Board (her employer), but by Mr Scrymgeour himself. While it is true that the Board is her employer, the individual employment agreement also contains a provision at clause 2.2 in the following terms:

> *All references to the Board or Employer in this Agreement are made on the understanding that the Headmaster as agent of the Board, is*

> *responsible for the appointment and management of staff and delivery of the curriculum. The Headmaster is responsible to the Board for matters relating to staff.*

[49] In the Authority's view, nothing turns on whether the instructions to Mr Abraham came in the first instance from the Board itself or from Mr Scrymgeour, the Headmaster. Clearly, in terms of the individual employment agreement clause just recited by the Authority, Mr Scrymgeour is responsible to the Board for staff matters, and this is plainly a staff matter.

[50] Further in the email dated 28 September 2009, she made the following observation:

> *Please could you inform Abraham Consultants Limited that their contract is solely with you and ask them please not to contact me again. This is clearly not an independent investigation as I, relevant parents and teaching staff have not been interviewed. I also note that this is an external body so I am assuming that I am now free to discuss these matters internally. I notice that there is no provision in my IEA for matters of dispute to be put before an external body prior to the Board.*

[51] Clearly, this communication from Ms Fox fundamentally misunderstands the nature of Mr Abraham's role, but given the way in which that matter had been handled by Hereworth School, that was inevitable.

[52] What happened next really confirms the Authority's concern about this whole process because Mr Abraham then wrote to Ms Fox by email dated 29 September 2009 and began with this passage:

> *We advise that pursuant to s.236 of the Employment Relations Act 2000 we are duly authorised representatives of Hereworth School and have been corresponding with you in that capacity.*
>
> *By letter dated 26 September 2009 we advised that any response or communication … you have … should be sent through our office. We are advised that you have ignored that request and instead emailed the Headmaster direct.*

[53] Further on in the same letter, the following passages occur:

> *Abraham Consultants Limited have been appointed as the duly authorised representatives of the school in this employment matter … and you cannot dictate to them whom they instruct. … The school is entitled to be represented just as you are.*

[54] Those passages just referred to give the lie absolutely to the claim that Mr Abraham is "independent". Plainly he is nothing of the kind. He is the school's

advocate. The attempt to present Mr Abraham in any other light does violence to commonsense. Ms Fox's response to Mr Scrymgeour the day before, when she pointed out succinctly that Mr Abraham was working for the school and not for her and therefore she was not disposed to talk to him, might have been unhelpful but, given the way Mr Abraham's involvement had been presented, was inevitable.

[55] What made things a great deal worse was Ms Fox's mistaken conviction in her 28 September 2009 email to the Headmaster that because Mr Abraham was external she felt that she was now free *"to discuss these matters externally"*. It was that challenge to Hereworth School that Mr Abraham was attempting to deal with in his letter of 29 September 2009 when he said:

> *If you elect to discuss these matters externally, you do so at your own peril.*

[56] Having perceived, correctly, that the ground had shifted in relation to Mr Abraham's involvement, with the school now *"fessing up"* and making clear that Mr Abraham was its agent rather than an independent investigator, as had previously been maintained, Ms Fox wrote again to the Headmaster on 30 September 2009 asking for documentary evidence that Mr Abraham was indeed the Board's agent and indicating that the sentence just quoted would be referred *"to the relevant authority"* as a *"threat"*.

[57] Hereworth School says that what Mr Abraham was endeavouring to convey was a warning to Ms Fox that she should not engage in debate with the school in a public forum because that would simply make the issues between the parties more difficult to resolve. As Mr Scrymgeour himself says in his evidence to the Authority:

> *There is nothing more polarising to parties who are endeavouring to resolve their differences than threats to make the debate public.*

[58] Having had Ms Fox seek evidence of Mr Abraham's authority to act, that was provided to her by email of 30 September 2009 together with a further warning that if Ms Fox had not responded to the matters referred to in previous correspondence from him by Friday, 2 October 2009, *"... our client will continue their process as considered appropriate"*.

[59] In her evidence to the Authority, Ms Fox observed that Mr Abraham should not have been considered:

> *... to have the necessary expertise to investigate the applicant's concerns. An appropriate independent consultant would have been an educational consultant from outside Hawke's Bay who had no relationship with the school, who had no affiliation with staff at the centre of the allegations and who was not acting as their legal representative.*

[60] This is a revealing observation by Ms Fox. The Authority agrees with much of what she says, although the suggestion that the consultant should come from outside the Hawke's Bay goes too far. The issue is one of independence and if it could be satisfactorily demonstrated that the proposed consultant was independent of the school and the protagonists, then wherever that person came from, they would have met the legal test. Where the Authority differs from Ms Fox fundamentally is in her conviction that the consultant would need to be, to use her words, *"an educational consultant"*. Ms Fox maintained throughout her evidence to the Authority and in her exchanges with the employer that the issue was not an employment relationship problem at all, and not an interpersonal difficulty between her and other staff, but was about educational standards. If that proposition were to be accepted, it is difficult to see how it squares appropriately with Ms Fox's own insistence throughout her correspondence with the school and her evidence to the Authority that various other members of staff had to withdraw and apologise for what they had said to her or take the consequences when she referred matters to a higher authority such as the Teachers' Council. Despite Ms Fox's conviction that these are matters to do with educational standards, they are nothing of the kind; they are interpersonal conflicts which can only be dealt with in our jurisprudence by the wide ambit of matters contemplated within the generic description "employment relationship problem".

[61] At best, the issues that concerned Ms Fox were in the nature of disputes about professional practice and at worst they were simply interpersonal conflicts in a workplace. Whatever the particular characterisation of them, they are matters which fall within the ambit of the employment relationship and they fall to be dealt with in the context of that relationship and in terms of the law relating to that relationship. It is for that reason that the law gives to employers the right in broad terms to manage its own workplace. Like most enterprises, a school requires a collaborative effort. Schools are unique workplaces because they involve a team of employees who are primarily professional in characterisation. It follows that there can be professional differences between teachers about how particular matters are to be dealt with.

[62] But it is the job of the employer to determine how those differences are to be resolved because ultimately the employer has to manage the collaborative effort to produce the desired outcomes. In insisting that the matters of concern to her were not interpersonal but educational, Ms Fox fundamentally misses the point and makes resolution that much more difficult. It is, of course, true that Ms Fox may well have ideas that would improve and enhance the experience of students at the school and her enthusiasm for endeavouring to promote those ideas can only be commended. But by indicating as she did that various people within the school's management were untrustworthy and therefore not capable of dealing appropriately with her issues, she narrowed artificially the potential audience for the suggestions that she wanted to make. Had she accepted that there were interpersonal issues wrapped up in her enthusiasm to promote a better way of doing things and sorted out those interpersonal concerns in a collaborative fashion as one inevitably has to do in a collegial environment, her various proposals might not have fallen on such stony ground.

[63] Ms Fox next endeavoured to engage directly with members of the Board. In her first email to the then Chair of the Hereworth School Board (Mr Beamish), Ms Fox understandably emphasises the educational issues that trouble her rather than the interpersonal ones and proposes that she present to the Board on those educational issues. While that may well be laudable in itself, it goes nowhere at all in terms of resolving the fundamental differences of opinion between her and other staff at the school. The response that Ms Fox got from the Chair was to try to return the debate to the various allegations that she had made about staff members and it included a clear statement that the Board's expectation was that Ms Fox would respond to the requests contained in Mr Abraham's communications (the request for further and better particulars on some of the matters she complained about) and indicated that the Board *"wishes to meet with you and discuss your specific allegations against Shirley Cameron, Paula Kasper and the unnamed Teacher Aide"*. The suggestion that Ms Fox present to the Board on academic standards was rejected by the Chair and Ms Fox was asked to specify if in fact she had a personal grievance and if so, what it was.

[64] Attempts by the Board to arrange a meeting with Ms Fox failed despite the Chairman's observation that exchanging material by email was not conducive to resolving matters.

[65] Then, by email dated 19 October 2009 and attaching a formal response dated the following day to the letters from Mr Abraham, Ms Fox developed her themes extensively. Later on 21 October 2009, Ms Fox indicated that:

> *… any meeting with the Board will need to be about all the issues, as educational and moral standards at the school are of a serious concern.*
>
> *We feel that the actions of senior management and the above two Board members* [a reference to Mr Beamish and Mr Abraham] *have bought* [sic] *the school into disrepute. The lack of an apology or remorse for the manner in which they have conducted themselves so far has been noted. We feel that their attendance in any meeting will not be conducive to a position resolution to the school.*
>
> *We feel your next Board meeting on 27 October will allow you an opportunity to discuss how this has been managed so far and whether or not the Board needs to take new direction. We suggest a date week beginning 2 November for my presentation of advancing educational standards at Hereworth.*
>
> *My support people (parents) and husband will be attending and if they have questions/concerns they will be raising them.* [This point responded to an earlier observation by the Board Chair that Ms Fox's support people would not have speaking rights.]
>
> *As yet we have received no signed denials from Mrs Cameron or Mrs Kasper. Unless we receive these prior to any meeting, then as far as we are concerned, they do not disagree with what I have said.*
>
> *As of this point, we ask that any further communication be conducted by another Board member as I will not be responding to Mr Abraham or Mr Beamish.*

[66] By letter dated 29 October 2009, Mr Beamish, the Board Chair, reiterated that the Board would not entertain a presentation about educational standards unless the *"complaints other personal allegations and breaches of privacy"* are able to be dealt with. He then communicates a decision by the Board to request mediation assistance from the Department of Labour's Mediation Service.

[67] Then, by email dated 29 October 2009, Dr Fox, writing on behalf of his wife, indicated to Mr Beamish that no further correspondence from him would be entertained and that Ms Fox would not be attending mediation. Dr Fox observed that mediation was a voluntary process and also made clear his concern about the performance of the Napier Office of the Department of Labour in respect of the arranging of the mediation.

[68] Ms Fox then sought to engage with Mr Tom Hamilton, a member of the Board of Hereworth School, and a meeting between the two was contemplated but then called off by Mr Hamilton on the footing that, because the school was trying to arrange mediation, a meeting would be *"premature"*.

[69] Ms Fox then wrote to the Board by email dated 5 November 2009 indicating again that mediation was a voluntary process and that:

> *... there is no statute in the Act to impose mediation on an employee. Please desist from referring to mediation. ... This is not a personal grievance ... it is about advancing educational and moral standards at the school.*

[70] By letter dated 6 November 2009, Sainsbury Logan & Williams, lawyers, wrote to Ms Fox indicating that they had *"recently been instructed to act for the Hereworth School Trust Board"*.

Subsequent events

[71] The Authority noted in the previous section of this determination the contact between Mr Tom Hamilton, a Board member, and Ms Fox. Mr Hamilton contacted Ms Fox by telephone on 30 October 2009 at the behest of the Board. The Board had just considered an email from Dr Fox on behalf of his wife dated 29 October 2009 and addressed to the Board Chair, Mr Beamish. In that email, Dr Fox observed that *"... we hold senior management, Doug Abraham and yourself in poor regard. We do not wish to communicate any further with you"*. The email concludes with these sentences:

> *Please do not waste any more of your time by contacting us. Your position is untenable as far as we are concerned. We are open to communications from other Board members.*

[72] It was really in response to that last statement that Mr Hamilton was delegated by the Board to ring Ms Fox and seek to move matters forward. One of the matters emphasised in the 29 October 2009 email just referred to was the continuing failure of the Board to apologise to Ms Fox for the alleged threat in the Abraham communication of 29 September 2009.

[73] From the point of view of the dispassionate observer, the Authority finds it a little difficult to understand why the Board had such difficulty in resolving this issue. On the face of it, assessing the correspondence generated from Ms Fox over the whole

period of the dispute between the parties the alleged threat made by Mr Abraham in his 29 September 2009 communication clearly developed more heat than light. The Authority has already observed why the remark was made; it was Mr Abraham's attempt, on behalf of the Board, to deal with Ms Fox's suggestion that she could in effect, "go public" with her issues, now that the Board had engaged an outsider.

[74] But the fact remains that, as Mr Scrymgeour himself made clear, the offending remark was not intended to be a threat; it was simply a robust use of language designed to discourage Ms Fox from taking the dispute into the public arena. While it is difficult to be critical of the Board for using truculent language of this sort when Ms Fox was every bit as inclined to use it herself, it is nonetheless puzzling that the Board did not grasp on this particular nettle and agree to give Ms Fox the apology that she sought.

[75] It can only be speculative, but it is difficult not to imagine that Hereworth School would have been in a stronger position in managing this dispute if it had immediately seen the sense of withdrawing the offending words and apologising for them. It is not good enough to simply say that they should not have offended; the fact is, they did. Ms Fox describes being frightened by what she perceived to be a threat and she told the Authority under affirmation that she called her husband home from work early because of her anxiety about what was said.

[76] Ms Fox says that when Mr Hamilton rang her on 30 October 2009, they had a preliminary discussion about a meeting and that he said that he would provide a written apology on the offending words prior to the meeting. On that basis, Ms Fox says that she agreed to meet on either 5 or 6 November 2009.

[77] Mr Hamilton seems to concede in the evidence he gave to the Authority that he would not condone any threat being made against any person but that does not go quite as far as Ms Fox thinks he went in the telephone discussion that the two of them had on 30 September 2009.

[78] In any event, what happened next was that, as part of the agreement between the two of them in the telephone discussion, Mr Hamilton provided written answers to three issues, the third of which related to the words complained of. Mr Hamilton correctly observes in his evidence that his email dated 2 November 2009 is designed to be conciliatory. Certainly it is written in that way.

[79] It is appropriate to set out in full the paragraph from Mr Hamilton's email that relates to the offending words:

> *Did I condone the threat that you believe was made against you and that if I did not would I put that fact in writing to you? I have reviewed the correspondence from ACL* [Abraham Consultants Limited, Mr Abraham] *to yourself dated 29 September 2009. On reflection, I don't believe I would have written the sentence "if you elect to discuss these matters externally, you do so at your own peril". Given what I know of the situation, however, neither do I believe I would have taken particular offence had these words been written to me. As discussed, I do not condone anyone making threats towards anyone else as I have found it rarely assists to resolve the situation at hand. Further, I do not believe that in this case that the words written were intended as a threat, rather, I believe that ACL were trying to point out that you may be in breach of your employment agreement if you did in fact follow a particular course of action. In retrospect I believe this could have been expressed in another way to you.*

[80] Those remarks by Mr Hamilton are temperate and sensible and in the normal course of events, one would have imagined that those observations would have dealt with the issue. Sadly, in the present case, that was not to be with Ms Fox continuing to maintain that the Board had not apologised. In her brief of evidence at para.1.33, for instance, she says that Mr Hamilton *"did not apologise for, retract or distance himself from the written threat"*. That puts it a little strongly in the Authority's opinion; clearly Mr Hamilton's words can be seen as distancing himself from the written observation and looking at it as an outsider, Mr Hamilton is expressing the view by implication that the words used were ill advised, which plainly they were. In the Authority's opinion, if, rather than the modest and temperate language that Mr Hamilton used in his email, the Board had simply resolved to apologise to Ms Fox for the distress caused by Mr Abraham's words and indicate that it was not the Board's intention to either distress her or to convey to her by those words any threat, that might well have enabled the parties to actually meet and had that happened, of course, matters could have been resolved by agreement.

[81] In any event, the proposed meeting between Mr Hamilton and certain other Board members and Ms Fox did not proceed because, by the eve of the proposed meeting dates (5 and 6 November 2009), Mr Webster was engaged as counsel by Hereworth School and because of that fact and the hoped for mediation that might follow, Mr Hamilton indicated *"it would be premature for us to meet"*.

[82] Ms Fox and Mr Webster for Hereworth School then proceeded to engage in correspondence around the usefulness or otherwise of mediation to resolve issues. Mr Webster correctly identified in that communication series that so far as the school was concerned, there was an employment relationship problem which it sought to resolve and he also observed, again correctly, that there might well be matters amounting to an employment relationship problem which Ms Fox had for resolution as well. The school accepted that there was no personal grievance but the short point was that there was a problem and the lengthy email exchanges between Ms Fox on the one hand and various representatives of Hereworth School on the other, was mute testament to that.

[83] The issue was how best to deal with the matter. Ms Fox had directed her energy into complaints to the Charities Commission on the one hand (concerning the performance of the Board) and the Teachers' Council on the other, concerning the educational issues. But to the dispassionate observer reading the correspondence between the parties, neither of those approaches goes anywhere towards resolving the issue for the Board which is that it has a dysfunctional workplace where one of its staff is indicating a lack of confidence in senior management and in members of the Board as well as in other members of staff. Plainly, the Board is entitled to have resolution of those matters and by failing to recognise her obligation to engage with the board on those matters without precondition or prevarication, Ms Fox failed to fulfil her obligations of good faith to her employer in precisely the way that Mr Webster foreshadowed in his earliest correspondence to Ms Fox. As Mr Webster indicated in that correspondence, Ms Fox, as an employee of Hereworth School, has an absolute obligation to act in good faith in respect of her engagements with the employer and that obligation includes an obligation *"to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative"*: s.4(1A)(b) Employment Relations Act 2000 (the Act).

[84] Notwithstanding those observations, it is a fact that Ms Fox made a determined and sensible effort to get a meeting with the Board in her email of 11 November 2009. That email even contemplates a meeting without preconditions, in particular, without the apology that Ms Fox continued to seek about the offending words in Mr Abraham's 27 September 2009 documentation. It also contemplated

mediation in Auckland, to avoid the perception of bias which had developed in Ms Fox's mind in respect of the Mediation Service in Napier.

[85] As the Authority made clear during the investigation meeting and in the preceding engagements with the representatives, it has no authority over the Department of Labour's Mediation Service and is in no position to comment on the propriety or otherwise of the Department's service save to make the observation that insofar as criticism is levelled at the Mediation Service because Mr Abraham is known to the Mediation Service, that criticism is fundamentally misplaced.

[86] In each of the offices of the Mediation Service around the country, the Authority would expect that staff would be familiar with the regular users of its service. Those regular users will include lawyers practising in the employment jurisdiction and lay advocates practising in the jurisdiction as well.

[87] In relation to the Napier office of the Department of Labour, Mr Abraham, as an employment adviser, will undoubtedly be involved in mediation on behalf of his clients on a regular basis and it would be surprising indeed if the staff of the Mediation Service in Napier did not know him well. But the fact that staff know him well does not of itself mean that Mr Abraham will be given favourable treatment over other parties. That allegation, if made, would have to be demonstrated on the basis of the evidence.

[88] The exchange between Mr Webster and Ms Fox continued during November with Ms Fox proposing mediation in Auckland and Mr Webster proposing mediation in the Hawke's Bay. Ms Fox continued to maintain that she did not understand what the employment relationship problem was that the Board had with her and Mr Webster continued to try to convey that. In an email dated 13 November 2009, Ms Fox indicated a willingness to meet but the apparent refusal of the Board to distance itself from the words complained about in Mr Abraham's earlier communication, remained a sticking point. In the result, the Board refused to *"accept the terms upon which you say* [Ms Fox] *you are prepared to meet"* and Ms Fox was summoned to a meeting of the Board set for Thursday, 19 November 2009 at 7.30pm at the school. Ms Fox's response was to say that she did not consider the instruction to attend a reasonable one and that she regarded the failure to apologise for the earlier offending remarks as *"unacceptable"* and she indicated that *"as you have now failed to apologise or disavow the Board from this prior threat, on multiple occasions, we*

will be actioning this further". The failure to evidence a willingness to attend the proposed meeting with the Board resulted in Ms Fox being issued with a formal written warning dated 19 November 2009.

[89] Her response to that was to quarrel with Mr Webster's authority to act. She referred him to s.236(3) of the Act noting that she had asked on previous occasions for his authority to act and simply been told by Mr Webster on his firm's letterhead that the school had retained his firm. For the record, that advice from a legal practitioner on letterhead is sufficient to *"establish that person's authority for that representation"* in terms of s.236(3) of the Act. It follows from the foregoing that the communications from Mr Webster to Ms Fox from the point at which his firm was engaged on retainer by the school all carry the authority of Hereworth School via the agency of the legal firm it had chosen to represent it.

[90] Matters took a darker turn when, on 20 November 2009, Mr Webster wrote to Ms Fox concerning an email circulated by an anonymous group of parents under the email title *"aromabadlaughs@hushmail.com"*. Mr Webster sought an assurance from Ms Fox that she had nothing to do with the material. Ms Fox provided that assurance by return email and has now given the same evidence on affirmation. Dr Fox has provided a similar assurance. For the avoidance of doubt, the Authority is satisfied that neither Ms Fox nor Dr Fox had anything to do with the drafting or distribution of this material.

[91] However, Ms Fox may well be seen by some disgruntled parents of the school as something of a standard bearer in relation to educational standards. Furthermore, it is clear to the Authority from the evidence that it heard that there are disgruntled parents at the school.

[92] However, that fact is no surprise. Every school has disgruntled parents. Parents are naturally passionate about the education of their children and they become disgruntled very quickly if they perceive that their sons or daughters are either not receiving the quality of tuition they expect or are in some other way being let down by the school system. That is particularly the case when private fee paying students are involved (as is the case here with Hereworth School).

[93] The short point is that, for the purposes of the employment relationship problem that the Authority is concerned with, it is satisfied that Ms Fox and Dr Fox

are not the architects of the email campaign; it is saddening that unhappy parents would circulate negative material about a school rather than addressing their concerns to the management but one of the consequences of modern communication methods is that this kind of material can be circulated to a very wide audience very quickly and can develop a life of its own.

[94] The next significant event is the departure of Ms Fox and her husband from the Hawke's Bay area. Ms Fox says that the precipitating factors in encouraging the move were the failure of the Board to apologise for the offending words in Mr Abraham's second significant communication and the contention that Hereworth School was aware of people coming and going from Dr and Ms Fox's residence. As to the latter point, Ms Fox maintained that Mr Scrymgeour had made an observation to Mr and Mrs Levett, school parents, that he was aware that they (the Levetts) had visited Dr and Ms Fox.

[95] In the evidence given to the Authority, Mr and Mrs Levett indicated that they had been happy with their son's progress while he was in Ms Fox's class but unhappy subsequently. They had raised concerns with Ms Cameron but were unhappy with her response and they subsequently talked informally with Ms Fox. She told them that she had raised the matter professionally within the school system and she expected to have it resolved within that system.

[96] So far as Mr and Mrs Levett were concerned, Mrs Levett told the Authority in her oral evidence that *"... no one from the school contacted me after I complained"* and in the end, Mr and Mrs Levett met with Mr Scrymgeour, the Headmaster, on Wednesday, 25 November 2009 to endeavour to progress their concerns. Mr and Mrs Levett were both adamant that in that discussion, Mr Scrymgeour asked the Levetts if they had been to Ms Fox's house. They readily confirmed that they had visited Ms Fox the day before. Plainly, Mr and Mrs Levett were surprised that the Headmaster should take an interest in their visiting Ms Fox, describing the Headmaster's question as *"very odd"*. The Authority agrees. It is difficult to understand why Hereworth School should take an interest in who amongst the parent community visits a particular teacher at their home and who does not. Ms Fox had just had a new baby and, although she was not teaching (she was on parental leave), she was still a member of staff and even if there were disagreements between the school and Ms Fox, the taking of an interest in who might visit Ms Fox is clearly not

appropriate. Having said that, there is no evidence that the Authority heard that would suggest that Hereworth School was monitoring Ms Fox's residence; Mr Scrymgeour's remark to Mr and Mrs Levett was, in the Authority's opinion, a consequence of a chance observation and nothing more.

[97] However, Ms Fox was unnerved by the intelligence that comings and goings at her house (or more accurately, one coming and going) had been observed and commented upon and on her evidence (which the Authority accepts), that was one of the motivating factors which led her and her husband to leave the district. Ms Fox gave evidence that a neighbour of hers saw *"a suspicious car"* outside Ms Fox's residence but that piece of evidence, entirely uncorroborated, is the only wider evidence of the house actually being "watched".

[98] In any event, Ms Fox and her husband moved to Northland effective 1 December 2009 and critically for what was about to follow, having made no secret of the fact that Ms Fox was leaving the Hawke's Bay area, she retained her cellphone number and her email address.

[99] On 9 December 2009, counsel for Hereworth School sent a letter by email to Ms Fox convening another disciplinary meeting on 18 December 2009. Counsel satisfied himself that the message had been received by Ms Fox's email address, and in subsequent correspondence date 21 December 2009, noted that it was the same email address that had previously been used to successfully send material to Ms Fox. However, Ms Fox gave evidence on affirmation that she did not receive that communication. The Authority accepts that evidence at face value. It seems to the Authority inconceivable that, given the lengthy history of this dispute, if Ms Fox had received the communication, she would not have felt obliged to respond to it immediately. That has been the invariable pattern throughout this dispute. And in the present case, the very fact that Ms Fox did not respond to the communication seems to the Authority to confirm her evidence that she never received it.

[100] There was endless argument and dispute between the parties as to how that could be during various exchanges at the investigation meeting but the short point is the Authority is satisfied on the evidence before it that Ms Fox did not receive that communication.

[101] Had she received it contemporaneously with the time it was sent, it is conceivable that she would have had ample opportunity, notwithstanding being the mother of a young baby, to arrange matters sufficiently so that she could attend the disciplinary meeting in Hawke's Bay, had she chosen to. Equally importantly, had she received the letter, she could have engaged further with counsel for Hereworth School in respect of the arrangements for the meeting, including, for instance, changing it to a more suitable time to suit her own circumstances, or even suggesting a change of venue now that she was living some 600km away from the school.

[102] Counsel for Hereworth School, no doubt puzzled by the lack of response to his 9 December 2009 letter, eventually rang Ms Fox on 15 December 2009 and after a conversation with Dr Fox, the latter emailed counsel to indicate that two days' notice was insufficient time to make the necessary arrangements for travel to Hawke's Bay.

[103] In his letter of 21 December 2009, counsel for Hereworth School first traversed the difficulties about communicating and then conveyed the results of the disciplinary meeting held on Friday, 18 December 2009 as being a preliminary view that Ms Fox was guilty of misconduct on the basis of the particulars set out in the 21 December 2009 letter and that the appropriate response to that was to terminate Ms Fox's employment summarily. Ms Fox was given a time and date within which to respond.

[104] Ms Fox did that through her representative, Dr Fox, who on 10 January 2010 provided an extensive rebuttal of the matters complained of by Hereworth School. Notwithstanding that, a notice of dismissal dated 12 January 2010 was conveyed to Ms Fox.

Discussion

[105] Ms Fox alleges she was unjustifiably dismissed. The Authority's task is to assess that claim by reviewing the evidence against the legal test. The test that applies here is the original *".. would .."* test not the modern *".. could.."* test. It follows that the test of justification that applies in the present case requires the Authority to pose the question whether the action taken by this employer was the action that a fair and reasonable employer would take in all the circumstances of the case.

[106] The Authority has concluded that Ms Fox's dismissal was justified and that, in consequence, her claim must fail. While it is true that Ms Fox complains about a

number of aspects of the behaviour of Hereworth School in the period from the initial grading issue in July 2009 down to the dismissal itself in January of the following year, the Authority is satisfied that once the School placed its reliance on its legal adviser and the process driven by him, Ms Fox's legitimate complaints fell away and the focus became starkly directed at whether or not the parties could engage with each other to resolve their differences or not, and if not, whether it was appropriate to contemplate a dismissal without the direct engagement of the employee.

[107] The Authority has already indicated its view that it prefers the evidence of Ms Cameron to that of Ms Fox in respect of the precipitating event, the grading issue. But the important point to grasp in respect of that precipitating event is that the steps which each party took after that issue was on foot were not only different steps but were steps down different paths. For the employer, Ms Fox raised issues which Hereworth School considered, eventually anyway, to create an employment relationship problem. For Ms Fox, the issues were never about her employment but rather about educational standards at Hereworth School and her concern to have those standards remedied. It follows that, throughout this dispute, the parties have been talking past each other.

[108] While Hereworth School has endeavoured to get Ms Fox to address it in the forums prescribed for an employment relationship problem resolution, Ms Fox has sought alternative fora in which she could address what she considered to be deficits in the educational practice at Hereworth School. In that latter regard, it is fair to observe that the evidence the Authority heard suggested that Ms Fox was something of a standard bearer for a group of disgruntled Hereworth School parents.

[109] Because of Ms Fox's insistence that there was neither a personal grievance nor an employment relationship problem throughout the dispute between the parties, she continued to make it difficult for Hereworth School to engage with her in respect of issues which the school considered were about an employment relationship problem that it had with Ms Fox. It was not until she was actually dismissed for misconduct that Ms Fox herself actively engaged with the employment institutions constituted under the Act.

[110] But the reality was that as soon as Ms Fox raised her issues with Ms Cameron and particularly, as soon as she refused to deal with Ms Cameron, she was creating an employment relationship problem and as her successive complaints about other staff

followed, she was creating further employment relationship problems or layers to the original employment relationship problem. No doubt there were pedagogical issues as well but, at its core, Ms Fox's dissatisfaction with a number of people at Hereworth School, including her immediate superior, the Principal and two Board members, created employment relationship problems which needed to be resolved. As a matter of fact then, the Authority finds that there were one or more employment relationship problems at Hereworth School which the School, as the employer party, was entitled to seek resolution of.

[111] That established, it follows that both parties have duties to the other in respect of the resolution of that employment relationship problem. But Hereworth School made engagement between itself and Ms Fox so much more difficult than it needed to be by its decision to engage Mr Abraham as an allegedly "independent" investigator. Certainly, as the Authority has already made clear earlier in this determination, the involvement of Mr Abraham was unhelpful in terms of the ultimate progressing of the matter, not because Mr Abraham was somehow inappropriate as an agent of Hereworth School, but because he was identified as "independent" when he was nothing of the sort, and the nature and extent of his brief was never disclosed to Ms Fox.

[112] Mr Abraham's involvement really became a "red herring". In response to an observation by Ms Fox, Mr Abraham had opined:

> *If you elect to discuss these matters externally, you do so at your own peril.*

[113] That observation, as well as clearly unsettling Ms Fox, led to her insistence that Hereworth School should withdraw and apologise for the words used. The Authority has already made clear that, in its opinion, that would have been a sensible step for Hereworth School to take, but it was never taken. The closest the school got to an apology was Mr Hamilton's attempt but that was insufficient for Ms Fox's purposes.

[114] Ms Fox's insistence on an apology from the school for the words complained of was a continuing theme in her various refusals to engage face-to-face with her employer. As the Authority has just re-emphasised, in its view, the school ought to have apologised for those words because they were not meant as a threat (although

they were perceived as such by Ms Fox), and they were plainly unhelpful in allowing the parties to actually engage with each other.

[115] In the result, no apology was made and Ms Fox continued to insist that without one, there would be no meeting.

[116] As a consequence of Mr Hamilton's efforts particularly, a meeting was almost arranged between Ms Fox and the school but the school pulled away from the commitment because it was attempting to arrange mediation through the Department of Labour at the same time. Again if the Authority looks at the matter as an outsider, it would have been better for the school to try to persevere with the arrangements for a face-to-face meeting because, as Ms Fox was quick to point out when the mediation proposal was raised, mediation is a voluntary business and she was in no mood to be part of a mediation.

[117] So, was Ms Fox entitled to behave the way that she did in putting barriers in the way of a meeting with her employer and preferring to engage by email rather than on a face-to-face basis? It is true that some people feel more comfortable dealing with matters in written form than they do on a face-to-face basis. And it may well be that given the matter had dragged on for as long as it had without any sense of resolution, a meeting between the parties would have generated more heat than light.

[118] However, as the Authority has already noted, both parties have an obligation to act in good faith, the one to the other. That is a statutory obligation imposed on parties by s.4 of the Act. As the Authority noted earlier, both parties have an obligation *"to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative"*: s.4(1A)(b) of the Act.

[119] Once Hereworth School instructed counsel, the situation, at least from the school's perspective, developed a sharper focus. With Mr Abraham, as it were, sidelined, counsel instructed were able to focus on their professional responsibilities as the school's legal adviser without the confusion of roles that beset Mr Abraham.

[120] Counsel advised Ms Fox of the school's decision to instruct its lawyers on 6 November 2009 and Ms Fox quite properly responded positively to the fresh approach by proposing a meeting with the Board on 11 November 2009 without any preconditions. In addition, Ms Fox, in the same email, makes the pointed observation

to counsel *"where have you been in the preceding three months?"*. She might well wonder.

[121] By letter dated 12 November 2012, counsel indicated that the school's preferred forum was mediation and so Ms Fox's proposed meeting fell on deaf ears.

[122] Hereworth School's preference for mediation is understandable given the difficulties in having any sort of dialogue face-to-face with Ms Fox but, looked at with the benefit of hindsight, it may have been preferable to allow a meeting to proceed between Ms Fox and the Board members that she would engage with because she was able to say in respect of mediation, as she had already made clear in earlier communications, that mediation was a voluntary process and she did not choose to be involved.

[123] Of course, refusing to participate in any form of dispute resolution when, as the Authority has already demonstrated, there is an employment relationship problem, is a breach of good faith. Hereworth School is entitled to identify mediation as its preferred method of engaging. Ms Fox is entitled, as she did, to refuse to attend, but in the context of a long dispute where there have been regular refusals to engage either without preconditions or refusals to engage with particular parties, is a breach of the good faith obligation which must inform all employment relationships.

[124] Having got the predictable response from Ms Fox that she would not attend mediation, Hereworth School then changed tack and by letter dated 17 November 2009 sought to get Ms Fox to attend a meeting with the Board on 19 November 2009. This request gave Ms Fox the opportunity to reimpose conditions before she would attend. As a result, there was no attendance by Ms Fox at the meeting and her failure to agree to engage resulted in her being given a formal written warning. In the circumstances, the Authority thinks it inevitable that a warning would be issued; Ms Fox had resiled from her condition-free position of 11 November 2009 and in the space of a handful of days, the preconditions were back in her response to the Board's proposed meeting on 19 November 2009.

[125] The receipt of a formal written warning for her failure to engage ought to have put Ms Fox on notice that she was standing into danger. But rather than adopt a less strident approach, Ms Fox's response was to question the authority of counsel to convey the written warning decision to her. The Authority must conclude that

Ms Fox knew or ought to have known that the receipt of that warning was evidence for the view that time was running out for a reasonable collaborative outcome and that her persevering with her confrontational stance could have only one result, namely an escalation of the response from Hereworth School.

[126] Next, Hereworth School made a further attempt to get Ms Fox to attend a meeting when it wrote to her by letter dated 9 December 2009. That letter requested Ms Fox's attendance at a disciplinary meeting on 18 December 2009. The Authority has already made clear that it is satisfied that Ms Fox did not receive that letter. As a consequence, there were hasty attempts made by counsel for Hereworth School to try to get in touch with Ms Fox and confirm her attendance at the proposed meeting but in the result, by the time those contacts were established, Ms Fox maintained it was too late for her to travel.

[127] The context of this exchange is important. It will be remembered that by this time, Ms Fox and her husband had moved to Northland, some 600km away from the school. This was not a secret departure. The school was aware that Ms Fox had left the district. There is correspondence from counsel for Hereworth School to Ms Fox confirming the school is aware of the Foxs' departure.

[128] But that same correspondence also makes clear that the school wishes to meet to resolve matters. Because this aspect is, in the Authority's opinion, important, the text of the relevant letter from Hereworth School's counsel dated 19 November 2009 is set out in its entirety below:

> *1. Notwithstanding your refusal to meet and the formal written warning now issued, the Board still has an obligation to attempt to resolve the employment relationship issues it has identified.*
>
> *2. You have indicated that you intend to be away from Hawke's Bay for a period of time.*
>
> *3. Please let us know when you are due to return and a range of dates when you would be available to meet with representatives of the Board.*
>
> *4. In default of a response from you, a further meeting time will be fixed and you will be invited to attend on that date.*

[129] That correspondence clearly establishes that the school knew that Ms Fox was away, that it was committed to trying to resolve matters by discussion and agreement, and that it wanted to meet with her as and when it was convenient for her so to do. It

proposed that she advise the school of when it would suit her, but in default of that, indicated that the school would identify its own dates if it had not heard from her.

[130] It was in that context then that the letter of 9 December 2009 was generated by counsel for the school. As the Authority has already recited, Ms Fox did not receive that letter, for whatever reason, was contacted shortly before the proposed meeting, declined to attend, and the school then proceeded to meet without Ms Fox's presence.

[131] The question the Authority must address is whether, in the circumstances just described, it was appropriate for Hereworth School to proceed with the meeting on 18 December 2009 or whether it should have made a further attempt to get Ms Fox's agreement to another date. Although it is clear to the Authority that Ms Fox did not receive the letter of 9 December 2009, there is no suggestion that she did not receive the earlier letter of 19 November 2009 in which it is made painfully clear that the school wishes to meet with her, wishes to resolve matters, and wants her to suggest dates that would be convenient. And in the absence of any suggestions from Ms Fox, the school concludes by indicating that it would identify its own dates.

[132] So Ms Fox would have known that the matter was still on foot, that she was being asked to suggest dates, notwithstanding that she was now living remotely from the school, and that in the event that she took no steps (which was in fact the position), the school would set a date.

[133] But given the Authority's acceptance that Ms Fox did not receive the 9 December 2009 communication advising her of the 18 December 2009 meeting, should Hereworth School have proceeded with the meeting or organised another time? The question has particular relevance because, of course, Ms Fox was not present and the decision was taken at the 18 December 2009 meeting, as a provisional decision, to dismiss Ms Fox for serious misconduct.

[134] So Hereworth School is seeking to justify a dismissal decision where it has not given the employee concerned an opportunity to be heard, and has proceeded with a disciplinary meeting notwithstanding there was some issue about whether the employee had even been notified in due time of the meeting. It is a truism that employees are entitled to have an opportunity to be heard on allegations of wrongdoing and in particular entitled to confront accusations face-to-face and be given an opportunity to put matters right. None of that happened in the present case.

[135] But given the history of this matter, is it reasonable to expect Hereworth School to again stay its hand and make a further attempt to get Ms Fox to actually attend a meeting? After all, this would be the second meeting of the Board that Ms Fox had been summoned to; she declined to attend the first and on the evidence, was not properly notified of the second.

[136] The Authority is not persuaded that Hereworth School failed in its obligations, given the unique circumstances of this particular dispute, in proceeding with a disciplinary meeting in the absence of the employee concerned. First, it would be wrong to say that the employee had not been heard. Ms Fox's chosen method of communication was by email and as this extensive determination makes clear, she made thorough use of that preferred method of communication. She had been given considerable opportunity to argue her position and her views were well known.

[137] Perhaps more importantly though, the Authority is persuaded that by the time the 18 December 2009 disciplinary meeting took place, the trust and confidence which must inform any employment relationship had completely broken down in this one. Ms Fox had adopted a truculent and confrontational style in her email exchanges with various representatives of the school and maintained that aggressive stance throughout the correspondence. By continuing to escalate the number of people within the Hereworth School community that she had lost confidence in, she made it increasingly difficult for the school to ever retain any trust and confidence in her.

[138] By her determined stance of generally refusing meetings unless certain preconditions had been met, she further narrowed the window of goodwill that might otherwise have existed for her.

[139] Thirdly, what Hereworth School did on 18 December 2009 was make a provisional decision to dismiss. Like the earlier written warning, the letter which counsel for Hereworth School generated after the 18 December 2009 meeting (the letter dated 21 December 2009), ought to have been a teachable moment for Ms Fox in the sense that, like the earlier warning, the letter of 21 December 2009 ought to have encouraged her in the view that her employment was in jeopardy if she did not change tack. So while it is true that she took the opportunity to respond to the letter, as she was requested to do, the response generated on Ms Fox's behalf by her advocate, Dr Fox, was *"nothing new"* according to the evidence of Board member

Mr Jock MacIntosh. Mr MacIntosh went on to say in his evidence under cross-examination:

> *It* [the 10 January 2010 response from Dr Fox] *was a continuation of the unhelpful material we had already received. No alternative dates were suggested for meeting to discuss the Board's concerns. There was no intention of engaging. … It was an inadequate response and didn't answer the questions.*

[140] In the Authority's opinion, Ms Fox ought to have perceived her difficulty, on receipt of the letter of 21 December 2009. In response, she might well have engaged in a more conciliatory approach perhaps suggested a further meeting in the New Year, perhaps even indicating a willingness to seek to repair some of the relationships which had been fundamentally damaged by the allegations that she had made. But none of that happened and, as Mr MacIntosh indicated in his cross-examination evidence to the Authority, the material provided was more of the same.

[141] The Authority has been referred to two relevant decisions concerning the culpability of employees where the employee *"unreasonably refuses to engage and imposes unacceptable conditions"* in respect of meetings with the employer.

[142] The first of those decisions is a decision of the Authority *Wilson v. Pet Stay Ltd* [2012] NZERA Wellington 153, a decision of Member Stapp.

[143] This was a case where the employee placed conditions on their attendance at a disciplinary meeting which the employer was simply unable to fulfil. While *Wilson* is authority for the proposition that a dismissal may be justified because of an employee's single failure to attend a disciplinary meeting, the present case involves serial failures by Ms Fox to engage appropriately with her employer as her good faith obligations require. Amongst other things, an employee is required to be both *"communicative and responsive"* in their engagement with their employer and on the facts in the present case, it is difficult to see how Ms Fox was either communicative or responsive in dealing with the numerous requests from Hereworth School for a meeting. Nor is there evidence that she was *"active and constructive in establishing and maintaining a productive employment relationship"* as s.4 of the Act also requires. Indeed, sadly, it is difficult not to categorise Ms Fox's behaviour as the very antithesis of the behaviour being mandated by the statute.

[144] Similarly, in *Radius Residential Care Ltd v. McLeay* [2010] ERNZ 371, Judge Ford opined that the refusal of an employee to engage appropriately with the employer during the disciplinary investigation by:

> *… refusing to answer any questions or communicate with her employer otherwise than in writing contributed significantly to her dismissal. … That duty [here His Honour refers to the duty under s.4(1A)(b) of the Act] extends throughout the entirety of an employment relationship including during the course of any disciplinary proceedings.*

[145] The learned Judge goes on to say that there will be occasions when a written response to a communication from an employer is sufficient:

> *… but I cannot accept that a refusal by an employee to answer questions or communicate verbally with an employer in the course of a disciplinary meeting convened for that purpose is appropriate.*

[146] While *McLeay* is a case where those comments just referred to related to the question of contribution, the Authority is satisfied that the Court's observations are apposite in the present case.

[147] Similarly, in the Employment Court decision of *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, the Chief Judge reasoned that in a redundancy situation, an employer must *"….be able to establish that …it has complied with the statutory obligations of good faith dealing in s4…because a fair and reasonable employer will comply with the law.."*

[148] So too might it be said that an employee ought to fulfil their obligations under s4 of the Act because employees also must comply with the law. A failure to engage willingly and without equivocation in an ordinary process of dispute resolution by discussion across the table is absolutely central to the mechanism by which employment relationship problems are addressed in our jurisdiction. If we allow parties to avoid engagement with each other we make dispute resolution that much more difficult and amongst other things limit the value and the primacy given to mediation, for example, in resolving employment relationship problems.

[149] While the Authority has been critical of the School's behaviour prior to its decision to instruct counsel, in the Authority's view, none of the earlier failings of the School are so grave as to undermine the conclusion that Ms Fox failed to fulfil her legal obligations to engage with the employer, so much so as to negative the usual

rule that the employee ought to be physically present at disciplinary meetings. In this case, the Authority has concluded that, in the end the School did all it reasonably could to get Ms Fox to engage with it and when she would not, the School made its decision without her.

[150] It is certainly possible that an earlier resolution might have been achieved if the School had not initially sought to progress matters in the way it did through Mr Abraham but criticism of the School's decision making in the period before it instructed counsel does not somehow excuse Ms Fox from her obligation to engage with her employer.

[151] In the end, the Authority's conclusion must rest on the decision the employer took at the end of the employment relationship and in that regard, the Authority is satisfied that Hereworth School has met the test imposed by the law.

[152] The School reached its conclusion that Ms Fox had been guilty of serious misconduct, from a consideration of a long line of issues. These are well summarised in counsel's letter of 21 December 2009.

[153] Of course, the conclusions the School reached were, in a sense, informed by a rather one sided view of the facts. Ms Fox was not present; her voice was not heard.

[154] But given Ms Fox's insistence on only meeting certain people, only meeting after pre conditions had been met, requiring her support people to have speaking rights, refusing to mediate except in another city and generally refusing to put herself out to engage with the School face to face, it was inevitable that the School would determine to proceed to consider the information it had, without Ms Fox's face to face involvement. The Authority has already made clear that in the particular circumstances of this case, Ms Fox's absence from the disciplinary meetings did not invalidate the School's process.

[155] Even without her involvement, the School had a wealth of information to consider, including from Ms Fox herself, as the Authority has already made clear. There was a hugh volume of email material setting out her views which the School was able to, and in the Authority's opinion, did consider.

[156] Hereworth School reached its conclusions about Ms Fox's culpability on that wide range of matters, in the usual way, based on the information it had. In the

particular circumstances of this case, that body of information did not include the personal representations of Ms Fox.

[157] In the Authority's judgement the inability of the School to get Ms Fox's agreement to meet with them was the core of their finding that she had been guilty of serious misconduct. Other matters were certainly important but the inability to engage face to face was crucial.

[158] The School had to consider the future. Ms Fox's parental leave would come to an end. She would then return to the School to re-commence her duties. Given the allegations she had made about some staff, and the staff and Board members she had made clear she did not trust and would not engage with, how could the School accept that future unless those matters had been dealt with?

[159] At its simplest, a fair and reasonable employer in Hereworth School's position would have concluded that Ms Fox was guilty of serious misconduct because of the findings inevitably made against her, in the various matters of complaint summarised in the letter of 21 December 2009. Most particularly, Ms Fox's unwillingness to engage with the employer in an open and unfettered way, so that the issues between the parties could be addressed, was fatal to her continued employment.

[160] In the Authority's opinion, the following passage from the 21 December 2009 letter from counsel for the School is a reasonable summary of the School's position, a position which the foregoing analysis confirms is accepted by the Authority:

" The conduct in issue is the failure by you to meet with your employer and respond to the specific allegations concerning your actions, …….and to substantiate through proper evidence the very serious allegations you have made about members of the teaching staff and other individuals……Your unsubstantiated allegations have the potential to seriously undermine the day to day interaction you have with the staff involved. They go to the heart of the employment relationship between you and the Board and seriously damage the trust and confidence that must exist in order for there to be a sustainable working relationship…"

Determination

[161] For reasons which the Authority has already canvassed at some length, Ms Fox's claim fails in its entirety.

Costs

[162] Costs are reserved.

James Crichton
Member of the Employment Relations Authority